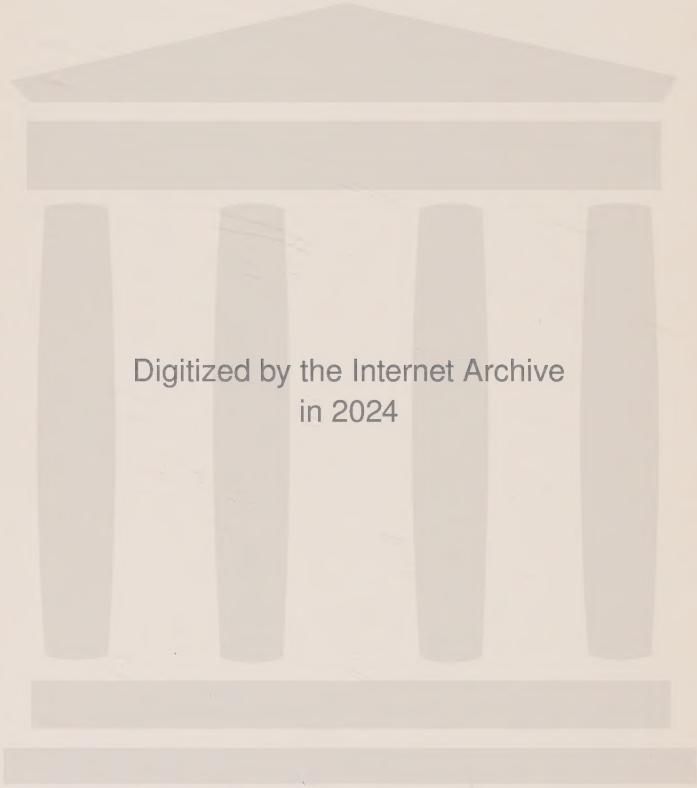
LEEDS POLYTECHNIC
LIBRARY

LEEDS POLYTECHNIC
LIBRARY

FOR REFERENCE USE IN THE LIBRARY ONLY

LEEDS BECKETT UNIVERSITY
LIBRARY
DISCARDED
71 0282726 7
TELEPEN

FOR REFERENCE USE IN THE LIBRARY ONLY



Digitized by the Internet Archive
in 2024

https://archive.org/details/lawreportsappeal0000unse_q5w4

THE LAW REPORTS

[1918] Appeal Cases

ISBN 0 406 09194 3

This compilation

© The Incorporated Council of Law Reporting
for England and Wales
and
Butterworth & Co. (Publishers) Ltd.
1974

Reprinted by photolitho in Great Britain by
Chapel River Press, Andover, Hampshire

This Reprint of
THE LAW REPORTS
is published in collaboration with
THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES
by
BUTTERWORTH & CO. (PUBLISHERS) LTD.
88 KINGSWAY
LONDON WC2B 6AB

NOTE. This Reprint is a photographic reproduction of the original volume apart from the Tables of Cases, Statutes and Statutory Instruments and the Subject Index, which are omitted in view of the facilities provided by modern text books and other works of reference

1918.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*

REPORTERS.

House of Lords	H. B. HEMMING,	*Barrister-at-Law.*
Priby Council	A. M. TALBOT,	*Barrister-at-Law.*

1918.

LONDON:

Printed for the Council of Law Reporting

BY THE WHITEFRIARS PRESS, LIMITED, OF LONDON AND TONBRIDGE.

And Published

BY THE COUNCIL AT 30, MONTAGUE STREET, W.C. 1.

T10 282726-1

LEEDS BECKETT UNIVERSITY
LIBRARY
LEEDS POLYTECHNIC
221203
DISCARDED
72415

JUDGES AND LAW OFFICERS.

MEMORANDA.

1917

January 18. Sir Henry Bargrave Finnelly Deane *having resigned his office,* Sir Maurice Hill, K.C., *was appointed one of the Justices of the High Court of Justice.*

July 24. Sir Arthur Richard Jelf, *formerly one of the Justices of the High Court of Justice, died at Oak House, Putney, aged* 79 *years.*

September 4. Sir Frederick Low, *one of the Justices of the High Court of Justice, died in London, aged* 61 *years.*

October 12. Arthur Clavell Salter, Esquire, K.C., *was appointed one of the Justices of the High Court of Justice, and was afterwards knighted.*

October 12. Alexander Adair Roche, Esquire, K.C., *was appointed one of the Justices of the High Court of Justice, and was afterwards knighted.*

November 16. Sir Edward Ridley *and* Sir Henry Bargrave Finnelly Deane *were sworn of the Privy Council, and took their places at the Board accordingly.*

December 20. The Right Honourable Rufus Daniel, Viscount Reading, G.C.B., K.C.V.O., *Lord Chief Justice of England, was created a Viscount and Earl of the United Kingdom, by the names of Viscount Erleigh, of Erleigh, in the county of Berks, and Earl of Reading.*

December 21. Sir Charles John Darling, *one of the Justices of the High Court of Justice, was sworn of the Privy Council, and took his place at the Board accordingly.*

1918.

January 1. The Right Honourable the Earl of Reading, G.C.B., K.C.V.O., *Lord Chief Justice of England, was appointed His Majesty's High Commissioner and Ambassador Extraordinary and Plenipotentiary on Special Mission to the United States of America.*

January 16. Sir Gordon Hewart, K.C., *Solicitor-General, was sworn of the Privy Council, and took his place at the Board accordingly.*

January 24. Sir James Thomas Woodhouse, Knight, *Railway and Canal Commissioner, was created a Baron of the United Kingdom by the name of Baron Terrington, of Huddersfield, in the county of York.*

March 19. The Right Honourable Sir Robert Romer, *formerly Lord Justice of Appeal, died at Bath, aged* 77 *years.*

May 2. The Right Honourable Lord Cozens-Hardy *having resigned his office, the* Right Honourable Sir Charles Swinfen Eady, *one of the Lords Justices of Appeal, was appointed Keeper or Master of the Rolls and Records of the Chancery of England.*

May 2. The Right Honourable Henry Edward Duke, K.C., *was appointed a Lord Justice of Appeal, and was afterwards knighted.*

July 5. The Right Honourable Sir Walter George Frank Phillimore, Baronet, *late a Lord Justice of Appeal, was created a Baron of the United Kingdom by the name of Baron Phillimore, of Shiplake, in the county of Oxford.*

July 12. The Right Honourable Robert John, Baron Parker of Waddington, *Lord of Appeal in Ordinary, died at Aldworth, Haslemere, Surrey, aged* 61 *years.*

August 7. The Right Honourable Sir George Cave, *one of His Majesty's Principal Secretaries of State, was appointed an Ecclesiastical Commissioner for England.*

September 11. The Right Honourable Lord Robson of Jesmond, G.C.M.G., *formerly Lord of Appeal in Ordinary, died at Telham Court, Battle, Sussex, aged* 66 *years.*

September 13. The Right Honourable Sir Samuel Evans, G.C.B., *President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, died at Brighton, aged* 59 *years.*

October 13. Sir Ralph Neville, *one of the Justices of the High Court of Justice, died at Ventnor, aged* 70 *years.*

October 18. The Right Honourable Sir William Pickford, *one of the Lords Justices of Appeal, was appointed President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, and was afterwards created a Baron of the United Kingdom by the name of Baron Sterndale, of King Sterndale, in the county of Derby.*

October 18. The Right Honourable Sir Edward Fry, G.C.B., *late Lord Justice of Appeal, died at Failand House, near Bristol, aged* 90 *years.*

November 6. Paul Ogden Lawrence, Esquire, K.C., *was appointed one of the Justices of the High Court of Justice.*

Sir Sidney Arthur Taylor Rowlatt, *one of the Justices of the High Court of Justice, was made a K.C.S.I.*

The Right Honourable Sir George Cave *was appointed a Lord of Appeal in Ordinary, and was created a Viscount of the United Kingdom by the name of Viscount Cave, of Richmond, in the county of Surrey.*

ERRATA.

Page	*Line*	*For*	*Read*
182	6	*Kerby*	*Kerly*
463	20	*W. Stephens*	*D. Stephens*
472	headnote, lines 6 and 8.	June 3, 1914.	June 3, 1915.
778	23	Bankes L.J.	Scrutton L.J.
798	5	rested	resisted

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1918, will be as follows:—

In the First Series,
[1918] 1 Ch. [1918] 2 Ch.

In the Second Series,
[1918] 1 K. B. [1918] 2 K. B. [1918] P.

In the Third Series,
[1918] A. C.

The Scottish Law Reports are cited as follows:—

Shaw, or, First Series Court of Session Cases	.	.	by	S.
Dunlop, or, Second Series	,,	,,	,,	.	.	,,	D.
Macpherson, or, Third Series	,,	,,	.	.	,,	M.
Rettie, or, Fourth Series	,,	,,	,,	.	.	,,	R.
Fraser, or, Fifth Series	,,	,,	,,	.	.	,,	F.
New Series	,,	,,	,,	.	.	,,	1907 S. C.
Scottish Law Reporter	,,	,,	,,	.	.	,,	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases	.	,,	Mor. Dict.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Agricultural Hall (Royal) Company *v.* Islington Assessment Committee – H. L. (E.)	525
Aktiengesellschaft für Cartonnagen-Industrie, Stevenson (Hugh) & Sons *v.* – (H. L. (E.)	239
Alderdale Estate Company, McGrory *v.* – H. L. (E.)	503
Alwina, The – – P. C.	444
Amarasuriya, Jayawickreme *v.* P. C.	869
Anchor Line (Henderson Brothers), Hood *v.* H. L. (Sc.)	837
Anglo-Mexican, The – P. C.	422
Assurance (London) Corporation, Becker, Gray & Co. *v.* H. L. (E.)	101

B.

Banbury *v.* Bank of Montreal H. L. (E.)	626

PAGE

Bank of Montreal, Banbury *v.* H. L. (E.) 626
Baron & Co., Morris *v.* H. L. (E.) 1
Baron Stjernblad, The – P. C. 173
Becker, Gray & Co. *v.* London Assurance Corporation H. L. (E.) 101
Brito, Muttunayagam *v.* – P. C. 895
Brougham, Cotman *v.* H. L. (E.) 514
Burns, Houston *v.* – H. L. (Sc.) 337

C.

Canada National Fire Insurance Company *v.* Hutchings – P. C. 451
Carlton Main Colliery Company, Clawley *v.* – H. L. (E.) 744
Clawley *v.* Carlton Main Colliery Company – – H. L. (E.) 744
Coal and Coke (Woodilee) Company *v.* M'Neill – H. L. (E.) 43
Collieries (Haunchwood), Heathcote *v.* – – H. L. (E.) 52
Colliery (Carlton Main) Company, Clawley *v.* – H. L. (E.) 744
Cornelius *v.* Phillips – H. L. (E.) 199
Cotman *v.* Brougham – H. L. (E.) 514

D.

Davidson (Charles R.) & Co. *v.* M'Robb – H. L. (Sc.) 304
Davies *v.* Powell Duffryn Steam Coal Company – H. L. (E.) 555
Demerara Turf Club *v.* Wight P. C. 605
De Verteuil *v.* Knaggs – P. C. 557
Dick, Kerr & Co., Metropolitan Water Board *v.* – H. L. (E.) 119
Dodwell & Co., John *v.* – P. C. 563
Duffy, Imperial Tobacco Company (Newfoundland) *v.* P. C. 181
Dynamit Actien-Gesellschaft, Rio Tinto Company *v.* – H. L. (E.) 260

E.

Egbert *v.* National Crown Bank P. C. 903
Ertel Bieber & Co. *v.* Rio Tinto Company – – H. L. (E.) 260
Estate (Alderdale) Company, McGrory *v.* – H. L. (E.) 503
Evans, Moore *v.* – H. L. (E.) 185

F.

PAGE

Fels, Permanent Trustee Company of New South Wales *v.* P. C. 879
Fire Insurance (Canada National) Company *v.* Hutchings – P. C. 451
Fire Insurance (Norwich Union) Company, Leyland Shipping Company *v.* – H. L. (E.) 350
Fung Ping Shan *v.* Tong Shun P. C. 403

G.

Galsworthy, London County Council *v.* – H. L. (E.) 851
Germania (No. 2), The – P. C. 472
Gibb *v.* The King – P. C. 915
Great Western Railway Company *v.* Helps – H. L. (E.) 141
Guest, Keen & Nettlefolds, Price *v.* – – H. L. (E.) 760

H.

Hakan, The – – P. C. 148
Haunchwood Collieries, Heathcote *v.* – – H. L. (E.) 52
Heathcote *v.* Haunchwood Collieries – – H. L. (E.) 52
Helps, Great Western Railway Company *v.* – H. L. (E.) 141
Hibernian Bank, Yourell *v.* H. L. (I.) 372
Hillerod, The – – P. C. 412
Hip Foong Hong *v.* Neotia & Co. P. C. 888
Hood *v.* Anchor Line (Henderson Brothers) – H. L. (Sc.) 837
Houston *v.* Burns – H. L. (Sc.) 337
Hutchings, Canada National Fire Insurance Company *v.* P. C. 451

I.

Imperial Tobacco Company (Newfoundland) *v.* Duffy P. C. 181
Inland Revenue Commissioners, Murray *v.* – H. L. (Sc.) 541
Insurance (Yangtsze) Association *v.* Lukmanjee – P. C. 585
Islington Assessment Committee, Royal Agricultural Hall Company *v.* – H. L. (E.) 525

J.

PAGE

James Henry Monks (Preston), Limited, Mackey *v.* – H. L. (I.) 59
Jayawickreme *v.* Amarasuriya P. C. 869
John *v.* Dodwell & Co. – P. C. 563
Joseph, Reid, Hewitt & Co. *v.* H. L. (E.) 717

K.

Knaggs, De Verteuil *v.* – P. C. 557

L.

Leyland Shipping Company *v.* Norwich Union Fire Insurance Company – H. L. (E.) 350
London Assurance Corporation, Becker, Gray & Co. *v.* H. L. (E.) 101
London County Council *v.* Galsworthy – – H. L. (E.) 851
London Joint Stock Bank *v.* Macmillan – – H. L. (E.) 777
Louisiana, The – – P. C. 461
Lukmanjee, Yangtsze Insurance Association *v.* – – P. C. 585
Lützow, The – – P. C. 435

M.

McCarthy, Regina City *v.* – P. C. 911
McGrory *v.* Alderdale Estate Company – – H. L. (E.) 503
Mackey *v.* James Henry Monks (Preston), Limited H. L. (I.) 59
Macmillan, London Joint Stock Bank *v.* – H. L. (E.) 777
M'Neill, Woodilee Coal and Coke Company *v.* – H. L. (E.) 43
M'Robb, Davidson (Charles R.) & Co. *v.* – H. L. (Sc.) 304
Marsh *v.* St. Leger – P. C. 861
Metropolitan Water Board *v.* Dick, Kerr & Co. – H. L. (E.) 119
Midland Railway Company, Warner's Sons & Co. *v.* H. L. (E.) 616
Mines (Simmer and Jack Proprietary), Union of South Africa (Minister of Railways and Harbours) *v.* – P. C. 591

PAGE

Monks (James Henry) (Preston), Limited, Mackey *v.* H. L. (I.) 59
Moore *v.* Evans - H. L. (E.) 185
Morris *v.* Baron & Co. H. L. (E.) 1
Murray *v.* Inland Revenue Commissioners – H. L. (Sc.) 541
Muttunayagam *v.* Brito – P. C. 895

N.

National Crown Bank, Egbert *v.* P. C. 903
Neotia & Co., Hip Foong Hong *v.* – – – – P. C. 888
Norwich Union Fire Insurance Company, Leyland Shipping Company *v.* – H. L. (E.) 350

P.

Parchim, The – – P. C. 157
Permanent Trustee Company of New South Wales *v.* Fels P. C. 879
Petroleum Development Company, Stollmeyer *v.* – P. C. 498n.
Petroleum (Trinidad Lake) Company, Stollmeyer *v.* – P. C. 485
Phillips, Cornelius *v.* - H. L. (E.) 199
Powell Duffryn Steam Coal Company, Davies *v.* – H. L. (E.) 555
Price *v.* Guest, Keen & Nettlefolds – – H. L. (E.) 760
Prinz Adalbert, The – P. C. 500
Proton, The – – P. C. 578

R.

Regina City *v.* McCarthy – P. C. 911
Reid, Hewitt & Co. *v.* Joseph H. L. (E.) 717
Rex, Gibb *v.* – – P. C. 915
——, Thompson *v.* – H. L. (E.) 221
Rio Tinto Company, Ertel Bieber & Co. *v.* Dynamit Actien-Gesellschaft *v.* Rio Tinto Company. Vereinigte Koenigs and Laurahuette Actien-Gesellschaft *v.* Rio Tinto Company – H. L. (E.) 260
Royal Agricultural Hall Company *v.* Islington Assessment Committee – H. L. (E.) 525

S.

PAGE

St. Leger, Marsh *v.* – P. C. 861
Shipping (Leyland) Company *v.* Norwich Union Fire Insurance Company – H. L. (E.) 350
Simmer and Jack Proprietary Mines, Union of South Africa (Minister of Railways and Harbours) *v.* – P. C. 591
Steam Coal (Powell Duffryn) Company, Davies *v.* H. L. (E.) 555
Stevenson (Hugh) & Sons *v.* Aktiengesellschaft für Cartonnagen-Industrie - H. L. (E.) 239
Stollmeyer *v.* Petroleum Development Company – P. C. 498n.
——— *v.* Trinidad Lake Petroleum Company – P. C. 485
Südmark (No. 2), The – P. C. 475

T.

Thompson *v.* The King H. L. (E.) 221
Tobacco (Imperial) Company (Newfoundland) *v.* Duffy P. C. 181
Tong Shun, Fung Ping Shan *v.* P. C. 403
Trinidad Lake Petroleum Company, Stollmeyer *v.* – P. C. 485
Turf Club (Demerara) *v.* Wight P. C. 605

U.

Union of South Africa (Minister of Railways and Harbours) *v.* Simmer and Jack Proprietary Mines – – – P. C. 591

V.

Vereinigte Koenigs and Laurahuette Actien-Gesellschaft *v.* Rio Tinto Company H. L. (E.) 260

W.

Warner's Sons & Co. *v.* Midland Railway Company – H. L. (E.) 616
Water (Metropolitan) Board *v.* Dick, Kerr & Co. – H. L. (E.) 119
Wight, Demerara Turf Club *v.* P. C. 605
Woodilee Coal and Coke Company *v.* M'Neill – H. L. (E.) 43

Y.

Yangtsze Insurance Association *v.* Lukmanjee – – P. C. 585
Yourell *v.* Hibernian Bank H. L. (I. 372

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

MORRIS . . . . . APPELLANT ; H. L. (E.)*

AND 1917

BARON AND COMPANY . . . . . RESPONDENTS. *Oct.* 19.

Sale of Goods—Contract required to be evidenced in Writing—Rescission—Variation—Accord and Satisfaction—Implied Rescission by unenforceable Parol Contract—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 4.

A contract for the sale of goods of more than 10*l.* in value, evidenced in writing as required by s. 4 of the Sale of Goods Act, 1893, may be impliedly rescinded by a parol contract for the sale of goods, though unenforceable by reason of its non-compliance

---

* *Present :* LORD FINLAY L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD PARMOOR.

H. L. (E.)
1917
MORRIS
v.
BARON AND COMPANY.

with the statute, where there is a clear intention to rescind as distinguished from an intention to vary.

Noble v. *Ward* (1867), L. R. 2 Ex. 135 explained and distinguished.

Dictum of Sankey J. in *Williams* v. *Moss' Empires, Ld.* [1915] 3 K. B. 242 overruled.

Case v. *Barber* (1681) T. Raym. 450 and *Wickham* v. *Taylor* (1681) T. Jones, 168 disapproved by Lord Finlay L.C.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal (Swinfen Eady L.J., Bankes L.J., and A. T. Lawrence J.) reversing a judgment of Bailhache J. so far as appealed against.

The facts are fully stated in the judgment of the Lord Chancellor.

The following summary is taken from the judgment of Lord Parmoor :—

"The appellant is a woollen manufacturer, and the respondents are merchants of worsted goods carrying on business at Brook Street, Bradford. On September 24, 1914, the appellant contracted to sell to the respondents 500 pieces of moss blue serge at the prices fixed and on the conditions stated in the memoranda in writing signed by both parties. On March 19, 1915, the appellant commenced an action against the respondents to recover the sum of 888*l.* 4*s.*, the value of goods supplied to that date. The respondents counterclaimed for 934*l.* 17*s.* 3*d.* for the non-delivery of goods in breach of the terms of the contract. When this action was coming on for trial the appellant and respondents made a parol arrangement, and for the purpose of this appeal the terms of such arrangement may be taken to be expressed in a letter of April 22, 1915.

"'Dear Sirs,—As personally arranged between Mr. Morris, and Mr. Baron, we herewith confirm the terms agreed upon.

"'Both to withdraw the legal proceedings and instruct the solicitors accordingly, and each to pay his own costs, you to allow 30*l.* (thirty pounds) to us to meet expenses incurred through not fulfilling the orders.

"'The account to be left over for three months so as to give us the opportunity of selling the goods, and the goods not delivered to be kept for us if we ask for them.

"'We have the option of taking up the balance of pieces to complete the order, giving time to make.

"'Yours faithfully,

"'Baron & Co.'

"On February 15, 1916, the appellant commenced a second action against the respondents to recover the sum of 888*l.* 4*s.* still due to him. The respondents admitted this claim, subject to their counter-claim for damages for non-delivery of goods. This counter-claim was founded on the April contract of 1915, and alternatively on the September contract of 1914. The trial judge, Bailhache J., gave judgment for the appellant on the counter-claim, but the Court of Appeal reversed this decision, and it is against this order that the appeal is brought."

Bailhache J., dealing with the case under the contract of April, dismissed the counter-claim on the ground that the respondents could not validly exercise their option while repudiating their obligation to pay. The objection that the counter-claim was not enforceable by the respondents by reason of s. 4 of the Sale of Goods Act, 1893, was raised but not argued; but it was fully argued in the Court of Appeal.

The Court of Appeal held (1.) that the contract of April was an agreement for the sale of goods and was not enforceable; (2.) that, the contract of April being wholly inoperative, the parties must be relegated to their rights under the original contract, on the ground that a written agreement, which was required by the Sale of Goods Act to be in writing, could not be rescinded except by an agreement in writing, and they gave judgment for the respondents on the counter-claim.

1917. July 19, 20, 23, 24. *Tindal Atkinson*, *K.C.*, and *Thomas P. Perks*, for the appellant. The contract of April, 1915, is none the less a contract for the sale of goods in that it is also a contract for something else, namely, the settlement of an action: *Harman* v. *Reeve* (1); and it is unenforceable against the appellant because it is not evidenced in writing as required by s. 4 of the Sale of Goods Act, 1893. But, though unenforceable, it operates to supersede the original contract.

(1) (1856) 18 C. B. 587.

H. L. (E.) 1917 MORRIS v. BARON AND COMPANY.

Noble v. *Ward* (1), on which the Court of Appeal relied, is distinguishable on two grounds. First, it was a decision under s. 17 of the Statute of Frauds (which differs in its language from s. 4 of the Sale of Goods Act, 1893) and proceeded on the footing that the second contract was absolutely void (as to which see *Leroux* v. *Brown* (2)), and a thing which has no existence cannot operate to do anything. Secondly, the decision merely showed that a parol agreement to extend the time for performing a contract required to be in writing by the Statute of Frauds did not rescind, vary, or in any way affect the written contract, and could not in point of law be substituted for it : *Hickman* v. *Haynes*. (3) But here the contract of April was not a mere variation of the mode of performance, but altered the legal position of the parties as a matter of substance ; it was a perfectly new contract made under circumstances which absolutely precluded the parties from reviving the old contract. A contract which is required to be in writing, though it cannot be varied, may be rescinded, by a parol contract : *Goss* v. *Lord Nugent*. (4) Further, assuming that the new contract amounts to a mere variation of the old contract, under s. 4 of the Sale of Goods Act, 1893 (which follows the language of s. 4 of the Statute of Frauds), except for the purpose of being enforced by action a contract which does not comply with the requirements of the section is perfectly good : *Maddison* v. *Alderson* (5) ; *Britain* v. *Rossiter* (6) ; *Lucas* v. *Dixon* (7) ; *Hugill* v. *Masker* (8) ; *Taylor* v. *Great Eastern Ry. Co.* (9) Therefore the contract of April may be used by the appellant by way of defence to the respondents' counter-claim for the purpose of showing that the respondents cannot charge him on the old contract inasmuch as the new contract amounted to an accord and satisfaction of their claim. The respondents cannot enforce the new contract against the appellant because it has not been signed by him, and they cannot enforce the old contract against him because the appellant can avail himself of the new contract. Lastly, apart from the question under the statute, the respondents are not entitled to succeed on their

(1) (1866–7) L. R. 1 Ex. 117 ; L. R. 2 Ex. 135.
(2) (1852) 12 C. B. 801.
(3) (1875) L. R. 10 C. P. 598, 604.
(4) (1833) 5 B. & Ad. 58, 65.
(5) (1883) 8 App. Cas. 467, 474, 488.
(6) (1879) 11 Q. B. D. 123.
(7) (1889) 22 Q. B. D. 357, 360.
(8) (1889) 22 Q. B. D. 364.
(9) [1901] 1 K. B. 774.

counter-claim in the face of their own default in payment. The respondents throughout refused payment for the goods already delivered until delivery of the balance. This case does not fall within the class of case where one party before breach gives notice that he does not intend to carry out his contract and the other party instead of treating the contract as at an end, as he is entitled to do, treats it as still subsisting. In such a case the second party cannot claim damages on the footing of an anticipated breach. But where, as here, one party breaks his contract in a matter going to the root of the contract he cannot call upon the other party to implement his obligation thereunder: *Withers* v. *Reynolds* (1); *Freeth* v. *Burr* (2); *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (3); *Johnstone* v. *Milling.* (4)

Langdon, K.C., and *Richard Watson*, for the respondents. 1. This case is covered by *Noble* v. *Ward* (5), which was rightly decided, and the parties are relegated to the original contract. An accord and satisfaction is of no effect unless the agreement is binding and can be enforced: *Case* v. *Barber* (6); *Lynn* v. *Bruce.* (7) 2. Reading the two contracts together, the latter is not a contract for the sale of goods, and therefore does not require to be evidenced in writing. In *Tyers* v. *Rosedale and Ferryhill Iron Co.* (8) Martin B. in a dissentient judgment, which was expressly adopted by Blackburn J. in the Exchequer Chamber, where the judgment of the Court of Exchequer was reversed, draws a distinction between a contract for the sale of goods and a contract respecting the delivery of goods already sold, which is not within the section at all. So here, assuming that the old contract is superseded, the new contract, which provides a substituted method of delivery, is not a contract for the sale of goods. 3. Upon a true view of the facts there never was any repudiation of the contract by the respondents and the appellant never treated the contract as repudiated. The payment of the price of the goods already delivered was not a condition precedent to the

(1) (1831) 2 B. & Ad. 882.
(2) (1874) L. R. 9 C. P. 208, 213.
(3) (1882) 9 Q. B. D. 648, 657, 666, 670; (1884) 9 App. Cas. 434, 443.
(4) (1886) 16 Q. B. D. 460, 467.
(5) L. R. 1 Ex. 117; L. R. 2 Ex. 135.
(6) T. Raym. 450.
(7) (1794) 2 H. Bl. 317, 319.
(8) (1873) L. R. 8 Ex. 305, 319; (1875) L. R. 10 Ex. 195, 199.

H. L. (E.) 1917

MORRIS v. BARON AND COMPANY.

respondents' right to delivery of the balance, but was an independent stipulation.

Tindal Atkinson, K.C., replied.

[The following authorities were also referred to:—*Williams* v. *Moss' Empires, Ld.* (1); *Ogle* v. *Earl Vane* (2); *Egerton* v. *Mathews* (3); *Leather Cloth Co.* v. *Hieronimus* (4); *Price* v. *Dyer* (5); *Vezey* v. *Rashleigh* (6); Comyns' Digest, "Accord" (B 4) 4; Addison on Contracts, 11th ed., p. 185; Fry on Specific Performance, 5th ed., s. 1060.]

The House took time for consideration.

Oct. 19. LORD FINLAY L.C. My Lords, this action was brought for the recovery of 888*l.* 4*s.*, the price of goods which had been sold and delivered by the plaintiff to the defendants. The right of the plaintiff to recover this sum was not in dispute, but the defendants set up a counter-claim for damages for non-delivery of other goods by the plaintiff to the defendants.

The case was tried by Bailhache J. without a jury. He gave judgment for the plaintiff on the claim, and dismissed the counter-claim on the ground that the defendants had not made a valid exercise of their option under the contract to have the goods in question delivered to them.

The Court of Appeal reversed the judgment of Bailhache J. on the counter-claim, and entered judgment upon it for the defendants, the damages to be assessed by a referee.

From that decision this appeal is brought to your Lordships' House by the plaintiff in the action.

The appellant is a worsted manufacturer and the respondents are merchants. On September 24, 1914, they entered into a contract in writing for the sale by the appellant to the respondents of 500 pieces of cloth: 223 of these pieces were delivered. Disputes arose between the parties, the respondents complaining of delay in delivery under the contract, and the appellant complaining of the respon-

(1) [1915] 3 K. B. 242.
(2) (1867) L. R. 2 Q. B. 275; (1868) L. R. 3 Q. B. 272.
(3) (1805) 6 East, 307.
(4) (1875) L. R. 10 Q. B. 140.
(5) (1810) 17 Ves. 356.
(6) [1904] 1 Ch. 634.

dents' failure to pay for the goods which had been delivered, and litigation ensued.

The first action was brought on March 19, 1915. In it the plaintiff (the present appellant) claimed 888*l.* 4*s.*, the price of the goods delivered, while the defendants (the present respondents) counterclaimed for damages in respect of the failure to deliver 277 pieces, the balance of the 500 pieces contracted to be sold. On April 20, 1915 (three days after the delivery of the counterclaim), the parties at an interview agreed to a settlement, and on April 22 the respondents sent a letter to the appellant setting out the terms of settlement. The appellant did not admit the correctness of the statement of the terms in this letter, but Bailhache J. for the purposes of his judgment assumed its correctness, and I shall deal with the case on this basis, accepting the respondents' statement of the terms of settlement. The letter is as follows :—

"24 and 26, Brook Street, Bradford, April 22nd, 1915.

"Messrs. The Troydale Mill Co., Leeds.

"Dear Sirs,—As personally arranged between Mr. Morris and Mr. Baron, we herewith confirm the terms agreed upon.

"Both to withdraw the legal proceedings and instruct the solicitors accordingly, and each to pay his own costs, you to allow 30*l.* (thirty pounds) to us to meet expenses incurred through not fulfilling the orders.

"The account to be left over for three months so as to give us the opportunity of selling the goods, and the goods not delivered to be kept for us if we ask for them.

"We have the option of taking up the balance of pieces to complete the order, giving time to make.

"Yours faithfully,

"Baron & Co."

The three months' extension of credit which was given by the terms embodied in this letter for the goods delivered expired on July 22, 1915, and on the 27th the appellant wrote asking for payment according to agreement. On the 28th the respondents wrote back saying that they would be pleased to pay the account if the appellant delivered the balance of the blue pieces to complete the

H. L. (E.) 1917

MORRIS v. BARON AND COMPANY.

Lord Finlay L.C.

order as stated in the respondents' letter of April 22. On August 17 the respondents wrote as follows to the appellant :—

"Gentlemen,—We are surprised you have not replied to our letter of the 28th July. As explained in that letter, we shall be glad to pay your account on delivery of the balance of the pieces to complete the order.

"As you have not answered we must now ask you to deliver the balance of the blue pieces on or before the 21st September, 1915. Kindly let us know by return of post if you will do this."

A proposal was made by the respondents in September for a variation in the class of goods to be delivered, but this came to nothing.

On September 27 the respondents wrote pressing for delivery, and on February 15, 1916, the second action (that on which this appeal is brought) was begun by the appellant.

Notwithstanding the agreement of April 22, 1915, the respondents had consistently refused payment for the goods already delivered, insisting on their claim to keep back the payment until delivery of the further goods.

The statement of claim in the second action was for the 888*l.* 4*s.* for the goods delivered.

The defence admitted the plaintiff's claim, subject to the counter-claim.

The counter-claim set out the contract of September 24, 1914, the proceedings in the first action and the settlement embodied in the letter of April 22, 1915, alleging that the defendants had exercised their option thereunder, but that delivery had not been made, and claimed damages for non-delivery under the arrangement of April 22, 1915, or, alternatively, under the original contract of September 24, 1914.

The counter-claim was based before Bailhache J. solely on the agreement of April 22, and after hearing the evidence of the parties he delivered judgment, disallowing the counter-claim on the ground that the demand by the respondents for the delivery of the goods under the arrangement of April 22, 1915, was not a valid exercise of the option inasmuch as it was coupled with a refusal to abide by the terms of that arrangement as to payment for the goods already delivered.

It was contended before your Lordships on behalf of the respondents that the payment of that money was not a condition precedent to the exercise of the option. But the real question is not whether payment was a condition precedent, but whether the respondents could make a valid claim to have the goods delivered under the option while refusing to observe their part of the bargain. It is perfectly true that the appellant did not, as he might have done, claim that the contract of April 22, 1915, was at an end, treating the respondents' conduct as repudiation. But the question remains whether they could validly exercise their option while repudiating their own obligation under the agreement which conferred that option. Bailhache J. held that they could not, and I agree. It was contended that the obligation to pay the 888*l.* 4*s.* at the end of the three months did not go to the root of the contract and that the only remedy was an action for the amount. The question is whether the obligation was regarded by the parties as an essential part of the new contract, and I think that its terms show that it was so regarded. It is, indeed, in itself a very important question for a manufacturer whether he is to go on making goods without being paid for those which have been delivered, and the stipulation that he should have the money at the end of the three months appears to me to be an essential part of the contract. A party to a contract which imposes certain obligations and confers certain rights upon him cannot claim to exercise these rights while repudiating his obligations in material particulars. The option to take the goods might indeed have been exercised before the three months had expired, but it would not have been a valid exercise of the option within the three months if at the same time the defendant repudiated his obligation to pay at the end of that term.

For these reasons I agree with the decision of Bailhache J. on the contract of April 22.

An objection was also raised before Bailhache J. to the enforcement of the new contract on which the counter-claim is based on the ground that it is not enforceable by reason of the 4th section of the Sale of Goods Act. This point was not argued before him owing to the view which he took on the point I have just dealt with. It was raised and fully argued in the Court of Appeal and in your Lordships' House.

H. L. (E.)
1917
MORRIS
v.
BARON AND COMPANY.
Lord Finlay L.C.

It was contended on behalf of the respondents that the new agreement was not an agreement for the sale of goods but for the settlement of an action. It was no doubt the settlement of an action but a part, and a very material part, of that settlement appears to me to have been an agreement for the sale of goods. It is an agreement that the respondents should have an option of taking the balance of goods undelivered, and it was implied that they were to pay for them on the terms of the original agreement. Surely this is an agreement for the sale of goods. This point, I agree with the Court of Appeal, would be enough to defeat the counter-claim.

But the Court of Appeal went on to hold that the arrangement of April 22, 1915, not being enforceable, must be wholly disregarded and the parties relegated to their rights under the original contract.

The Court of Appeal treated the case of *Noble* v. *Ward* (1) as having decided as a matter of law that in a case to which the 4th section of the Sale of Goods Act applies the original contract cannot be rescinded by a contract not complying with the section. In that case there was a valid contract on August 18 for the delivery of goods by the plaintiff to the defendant, and at an interview on September 27 it was agreed that the time for delivery should be extended. The defendant refused to take delivery and an action was brought for non-acceptance, the declaration covering either the contract of August 18 or that of September 27. The case was tried before Bramwell B., who directed a nonsuit on the ground that the contract of August 18 had been rescinded by the parol agreement of September 27, and that the parol agreement itself could not be sued on owing to the 17th section of the Statute of Frauds. The nonsuit was set aside by the Court of Exchequer, and Bramwell B. was himself a member of the Court and delivered the leading judgment. He pointed out that under s. 17 the contract of September 27 was not "allowed to be good," and that to treat it as having the effect of rescinding the old contract would be to hold that it was good for that purpose. A new trial was accordingly ordered. This decision was affirmed in the Exchequer Chamber, judgment being delivered by Willes J. He said that no rescission could be effected by an invalid contract and that it would be at least a question for the jury whether the parties did intend to rescind.

(1) L. R. 1 Ex. 117; L. R. 2 Ex. 135.

There are two observations to be made on this case.

In the first place, the agreement varying the first agreement was by s. 17 of the Statute of Frauds one which was not allowed to be good, while under s. 4 of the Sale of Goods Act, 1893, which applies in the present case, it is merely not enforceable by action.

There is a marked difference between the wording in this respect of the 4th section of the Statute of Frauds and the 17th section, as was pointed out in *Leroux* v. *Brown* (1), and, notwithstanding the obiter dicta (for they are no more) of some eminent judges, I do not think that the language of the two sections had the same effect. For the present purpose it is enough to say that both Courts in *Noble* v. *Ward* (2) treated the contract as being invalid. The change made in the wording of the 4th section of the Sale of Goods Act as compared with s. 17 of the Statute of Frauds in my opinion altered the law. The agreement of April 22, 1915, in this case is not under that section invalid, as was the agreement in *Noble* v. *Ward* (2) under s. 17 of the Statute of Frauds. It is only not enforceable by action.

In the second place, *Noble* v. *Ward* (2) does not lay down as a matter of law that the parties cannot agree to rescind a written agreement which the law requires to be in writing by the substitution for it of another agreement not in writing, and therefore unenforceable. On the contrary Willes J. in the Exchequer Chamber says that the question would be for the jury. If the law were as the Court of Appeal in the present case has laid it down, he would have said that the judge must rule that such a rescission could not take place.

The point which arises in such cases seems to me to have been well stated by Lord Denman in *Stead* v. *Dawber*. (3) In that case there was an agreement for the sale of goods to be delivered "on the 20th to the 22nd." The plaintiff at the defendant's request verbally agreed to enlarge the time to the 23rd or 24th. Lord Denman, after saying that many cases had been cited, expressed himself as follows: "But it seems to us that we are mainly called on to decide a question of fact; what, namely, was the intention of the parties in the arrangement come to for substituting the 24th for the 22nd as the day of delivery; did they intend to substitute a new contract

(1) 12 C. B. 801. (2) L. R. 1 Ex. 117; L. R. 2 Ex. 135.
(3) (1839) 10 Ad. & E. 57, 64, 65.

H. L. (E.) 1917

MORRIS v. BARON AND COMPANY.

Lord Finlay L.C.

for the old one, the same in all other respects except those of the day of delivery and date of the accepted bill, with the old one?"

The present is not a case in which there has been a mere attempt to vary the written contract by parol, the situation of the parties being otherwise unchanged. The legal proceedings then pending between the parties were withdrawn, each bearing his own costs, a sum of 30*l.* was to be allowed to meet expenses from non-delivery, three months' credit was given to the respondents to give them the opportunity of selling the goods, and the respondents were released from the obligation to take the balance undelivered, getting an option instead. Under these circumstances it seems to me to be out of the question to hold that merely because the option is not enforceable on account of the 4th section of the Sale of Goods Act the rights of the parties are to be regarded as still governed by the original contract under which the respondents were bound to take delivery of the balance. Both parties treated the original contract as at an end until attention was called in the Court of Appeal to the case of *Noble* v. *Ward* (1), and the respondents throughout insisted on the option given by the new arrangement and treated the obligation to take delivery as at an end. To go back to the default in making delivery before the first action would be to ignore the settlement for 30*l.* of that claim, and to give damages for a subsequent default would be to treat the respondents as having been willing after the settlement to perform the original contract, which they certainly were not.

The evidence in the present case points to the conclusion that the parties intended not merely to vary the original contract but to set it aside and substitute another for it, giving a mere option to take delivery of the parcel undelivered. This is the effect of the language of the memorandum of April 22, 1915, and it was on this assumption that all the subsequent dealings and correspondence of the parties proceeded. It is true that neither party adhered to its terms. The appellant tried to get payment of the 888*l.* 4*s.* before the three months' further credit had expired, and the respondents refused to pay when it had expired, claiming to retain the money until the goods were delivered. But neither party ever referred to the original

(1) L. R. 1 Ex. 117; L. R. 2 Ex. 135.

contract as governing their rights; on the contrary, they treated it as at an end.

Is the law such as to prevent effect being given to the intention of the parties to treat the original contract as rescinded?

All that *Noble* v. *Ward* (1) decided was that it was a mistake to say that as a matter of law the original contract was rescinded, the variation being by parol and there being no change of circumstances. It did not decide that as a matter of law the first contract still existed. As was said in the judgment of the Exchequer Chamber, that would be a matter for the jury. There are some old cases in which it was held that there could not be an accord and a satisfaction by taking an unenforceable agreement in substitution for one which was enforceable (see *Case* v. *Barber* (2) in the 33rd year of Charles II.; also Comyns' Digest, "Accord" (B 4) 4, 6, and the case there cited of *Wickham* v. *Taylor* (3), 33 Car. 2); but I do not think that these cases can be now regarded as good law. The non-enforceability of the new agreement would no doubt be a very material fact in arriving at a conclusion upon the question whether the new agreement without performance was taken in accord and satisfaction of the old, but it seems to me to be immaterial when once this has been established in point of fact.

In the present case the parties, in my opinion, took the new agreement such as it was with the other terms of settlement in accord and satisfaction of the original agreement, and there is nothing in law to prevent them from doing so. The respondents, therefore, must stand or fall by the agreement of April 22. It was upon that agreement that the case was brought before Bailhache J., and the learned judge held that the respondents could not recover upon it because they not only failed to pay the 888*l.* 4*s.* at the expiration of the extended credit given by that agreement, but throughout insisted that they would not pay until the further goods had been delivered under the option.

In my opinion the decision of Bailhache J. should be restored and this appeal allowed with costs here and below.

VISCOUNT HALDANE. My Lords, Bailhache J., who tried the action out of which this appeal arises, decided that what was done

(1) L. R. 1 Ex. 117; L. R. 2 Ex. 135.
(2) T. Raym. 450.
(3) T. Jones, 168.

H. L. (E.) 1917

MORRIS v. BARON AND COMPANY.

Viscount Haldane.

by the respondents, as it appeared from their letters and the oral evidence, amounted to a repudiation of their contract. In order to reach this conclusion legitimately it had, as I think, to be established that the respondents did more than merely commit a breach of the particular obligation which they violated by insisting on delivery of the still undelivered goods, or on damages for their non-delivery, before paying the money which they owed for the price of the goods already delivered. Such a refusal to pay would not be enough unless it took place in circumstances which rendered what was done inconsistent with an intention to be bound any longer by the contract as a whole. I doubt whether so much as this ought to be inferred in the case before us, and my inclination on this point is to take the view which was adopted by the Court of Appeal. But I do not think that it is necessary to decide the question, for it appears to me that the effect of the letter of April 22, 1915, coupled with the circumstances in which it was written, was to extinguish altogether the earlier contract for delivery of September 24, 1914, the only contract which the respondents could really enforce by their counter-claim.

It was argued for the appellant that he could succeed even without establishing so much as that the letter of April 22, 1915, effected a complete extinguishment. For it was suggested that, although the respondents were precluded by the requirements of s. 4 of the Sale of Goods Act, 1893, from enforcing by their counter-claim in the action any variations made by that letter of the earlier contract, still, even if the alterations amounted to no more than variations, as distinguished from total abrogation, the appellant could set them up and rely on them by way of defence. The Sale of Goods Act, which in substance follows the language, not of s. 17 of the Statute of Frauds, but of s. 4, provides merely that a contract which is not evidenced by a note or memorandum signed by the party to be charged on it, or his agent, cannot be enforced in proceedings. The contract, it was said, therefore stands, although it is one of imperfect obligation. It was argued that it may on this account be relied on by a defendant who asserts that it contains, read together with the original contract which it sought to vary, the real and only complete terms of the bargain. If this were so the appellant contended that in the present case no claim would lie against him for

damages for non-delivery. For, to begin with, the bargain of April 22, 1915, amounted to an accord and satisfaction of the claim for damages against him which had accrued and had been asserted in the previous action which was compromised. In the second place, the appellant urged that the respondents had not given an order for delivery of any goods under the terms of the agreement of compromise which varied the old contract, and that consequently there had been no breach.

My Lords, adverting first to the question whether the appellant as defendant to the counter-claim could rely on the second and informal agreement as entitling him to set up mere variations made by it of the terms of the old agreement, I think the contention of the appellant's counsel at the Bar is untenable. It is no doubt true that the provisions of s. 4 of the Sale of Goods Act relate to evidence and procedure and not to substantive validity. They follow in this respect the provisions of s. 4 of the Statute of Frauds, and ever since *Leroux* v. *Brown* (1) settled what was finally held to be the true view, despite apparently conflicting dicta in earlier cases, it has been clear that such provisions belong to the lex fori rather than to substantive law. Lord Blackburn, in his judgment in this House in *Maddison* v. *Alderson* (2), adopts this view of the Statute of Frauds, and lays it down as applicable to the 17th as well as to the 4th section of that statute. A similar view had been previously expressed, not only by the members of the Court of Appeal who decided *Britain* v. *Rossiter* (3), but in earlier cases, and I think that it must now be taken to be the better opinion that the 4th and 17th sections stand on the same footing in this respect. It is true that the language of the 17th section, which, like the 4th section of the Sale of Goods Act, relates to the sale of goods of the value of 10*l.* or upwards, differs from that of the 4th. Instead of saying, as the latter and also the 4th section of the Sale of Goods Act do, that no action shall be brought to charge any one on a contract which does not comply with it, it says that no contract which does not fulfil its requirements "shall be allowed to be good." But these words have been construed as meaning good for the purpose of being enforced by proceedings. This being so, they do not destroy the contract for

(1) 12 C. B. 801. (2) 8 App. Cas. 467, 488.
(3) 11 Q. B. D. 123.

H. L. (E.) 1917 MORRIS v. BARON AND COMPANY. Viscount Haldane.

every purpose. But I think that, in addition to this, a further construction is now firmly settled which bases both the 4th and 17th sections of the Statute of Frauds upon a special rule of evidence. That rule is that where an agreement is validly entered into which has had to comply with the Statute of Frauds, and variations are afterwards sought to be introduced by parol or by a document which does not comply with the statute, these variations cannot be set up even by a defendant as an answer in proceedings to enforce the original agreement. This rule was so laid down by Sir William Grant in *Price* v. *Dyer* (1), and again by a later Master of the Rolls Lord Lyndhurst (at that time Sir John Copley) in *Robinson* v. *Page*. (2) These authorities were followed not long since in *Vezey* v. *Rashleigh* (3) by Byrne J. It shows how definite the principle thus based on the statute was considered to be that in these cases, which related to the specific performance of contracts for the sale of land, the rule was applied, notwithstanding the tenderness towards defendants which the element of discretion in decreeing specific performance sometimes admits of. But both Sir William Grant and Lord Lyndhurst intimated the opinion that complete rescission by parol, as distinguished from mere variation, stands on a different footing, and is outside the principle so established.

In the Court of Appeal in the present case it was held that the respondents as plaintiffs in the counter-claim could wholly disregard what was looked upon merely as an invalid attempt at variation and could set up a breach of the original agreement as remaining for this purpose unaltered. It seems to have been thought that this conclusion covered the whole ground, and disposed of the matter in controversy. The authority relied upon was *Noble* v. *Ward*. (4) The judgments there interpreted the 17th section of the Statute of Frauds as establishing the same rule as the 4th, a rule which the apparently still more emphatic expression in the 17th section "shall not be allowed to be good" rendered the easier to recognize. The decision was one of high authority, for it was first given in the Court of Exchequer by Bramwell B. on behalf of that Court, and it was afterwards affirmed in the Exchequer Chamber in

(1) 17 Ves. 356, 363.
(2) (1826) 3 Russ. 114, 121.
(3) [1904] 1 Ch. 634.
(4) L. R. 1 Ex. 117; L. R. 2 Ex. 135.

a judgment which Willes J. delivered on behalf of a Court consisting of Blackburn, Mellor, Montague Smith, and Lush JJ. as well as himself. Neither Bramwell B. nor Willes J. draw any distinction between the terms of the 17th and the 4th sections of the Statute of Frauds, and from the authorities referred to by them it appears as though no such distinction was in their minds. Lindley J., in delivering the judgment of the Court of Common Pleas in *Hickman* v. *Haynes* (1), seems to take the same view.

Now the important point here is to see, not merely what *Noble* v. *Ward* (2) decided, but what it did not decide. I think that it did not decide, as the Court of Appeal appear to have supposed, that an agreement which complied with the statute could not have an end put to it by a subsequent parol agreement. The action had been brought on a valid written contract for the sale of goods of more than 10*l.* in value, to be delivered at certain times. The times of delivery under this agreement were sought to be treated as varied by a parol agreement. The question was whether what had happened was that the old contract was gone. It was held that, on the facts, there was no giving up of the old contract independently of the effect of such variations as had been attempted to be imported by the new one. There had been a still earlier written contract than that sought to be varied, apparently a formal document, and it was treated as effectively cancelled by the language of the very parol contract which was held inoperative to merely vary the terms of the formal contract which followed the first. What was really decided was that while the parties might have entered into a parol contract to rescind simpliciter the second, just as they had so rescinded the first, they had not done so. As to the second, they had simply made a new parol contract which sought to vary the mode of carrying the second one into effect. In one sense, no doubt, the intention was to rescind, for the novation attempted to be effected by the final parol contract would, if valid, have established a new contract containing as an entirety the old terms together with and as modified by the new terms incorporated. But this could only have amounted to a partial rescission, or, in other words, a mere variation; and, as Willes J. pointed out in the Exchequer Chamber, the question

(1) L. R. 10 C. P. 598. (2) L. R. 1 Ex. 117; L. R. 2 Ex. 135.

H. L. (E.) 1917

MORRIS v. BARON AND COMPANY.

Viscount Haldane.

whether there had taken place an independent and complete rescission, if it had been really raised, must under the circumstances have formed a separate question for the jury, a question which in fact was not put. What was therefore decided was merely that where parties enter into an invalid contract, which purports to vary, and only to that extent to supersede or rescind, an earlier written contract, the later one does not operate validly. It was not decided by *Noble* v. *Ward* (1) that the Statute of Frauds prevents a parol agreement, if it plainly purports to do so, from rescinding in its entirety a previous written contract. Even although itself incapable of being sued on, a parol contract may have that effect. The question is whether there is an intention in any event to rescind, independent of any further intention which may exist to substitute a second contract. I think that *Noble* v. *Ward* (1) affirms what seems to result from principle, that in such a case the agreement to rescind must receive effect.

Even if *Noble* v. *Ward* (1) can be taken as a decision confined to the 17th section, which I think it ought not to be, the authorities in equity to which I have referred established the principle clearly as regards the 4th section of the Statute of Frauds and of the Sale of Goods Act. No doubt it is not to be found in the expressed words of the sections. But if the construction placed by the Courts on such words is not accepted injustice will result. For it would then be in the power of a defendant to insist that the contract to be sued on by the plaintiff must be the entire new contract comprising the old one with the parol variations, and then to defeat the plaintiff by setting up the statute. The Courts, in order to avoid this result, have read the language as implying that the original formal contract is not, in any question of evidence in proceedings, to be treated as varied by a subsequent contract which is informal, and therefore of imperfect obligation. But this reason obviously does not apply to a complete rescission by parol, which does not seek to set up a new contract to be sued on, but merely terminates existing relations.

Accordingly while a parol variation of a contract required to be in writing cannot be given in evidence, the very authorities which lay down this principle also lay down not less clearly that parol evidence is admissible to prove a total abandonment or rescission.

(1) L. R. 1 Ex. 117; L. R. 2 Ex. 135.

Now there is no reason why this should not be done through the instrumentality of a new agreement which does not comply with the statutory formalities, just as readily as by any other mode of mutual assent by parol. What is, of course, essential is that there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which still leave it subsisting.

The Court of Appeal in the present case indorsed with their approval the judgments of the Divisional Court in *Williams* v. *Moss' Empires, Ld.* (1), delivered by Shearman J. and Sankey J., and followed these judgments. My Lords, it is with hesitation that I differ from any statement of the law by these two able judges, just as I always hesitate in differing from Swinfen Eady L.J. and Bankes L.J. But consideration has satisfied me that *Williams* v. *Moss' Empires, Ld.* (2) was a more than doubtful decision. There, under a contract in writing which was not to be performed within a year, the plaintiff had been engaged by the defendants to act at their theatre on certain terms which included the payment of salary at a specified rate. During the currency of the contract, and within less than a year from its termination, the parties verbally agreed to a variation of the plaintiff's salary for a part of the remainder of the term of the engagement. Subsequently the plaintiff sued the defendants to recover salary earned since the verbal agreement at the rate specified in the original contract. It was held that the verbal agreement, being one which was to be performed within a year, and therefore not within the Statute of Frauds, was admissible in evidence to prove that the parties had substituted for the original contract a new contract embodying the variation as to salary along with the unaltered terms of the original contract. The statement of the law made by Byrne J. in *Vezey* v. *Rashleigh* (3), to which I have already referred as following the previous decisions of Sir William Grant and Lord Lyndhurst, was criticized as inadequate. It was said that *Noble* v. *Ward* (4) and other cases had laid down the law more correctly as being that where an agreement varying an

(1) [1915] 3 K. B. 242.
(2) [1915] 3 K. B. 242, 247, 248.
(3) [1904] 1 Ch. 634.
(4) L. R. 1 Ex. 117; L. R. 2 Ex. 135.

H. L. (E.) 1917 — MORRIS v. BARON AND COMPANY. — Viscount Haldane.

agreement which would be invalid if it were not in writing "is itself of such a character that it is bound to be in writing," then, unless it is in writing, it cannot be relied on, but that it is otherwise when it need not itself be in writing. The authorities were said by Shearman J. to have left it open to the Court to hold that "if there is nothing in the terms of the new contract which necessitates a written contract, then, although the original contract was one which was bound to be in writing, the new parol contract can be enforced because although it is not in writing it is nevertheless an effective contract." Sankey J. put the same view in other words: "A contract which in compliance with the Statute of Frauds is in writing may be rescinded by a new agreement. The new agreement may be one which in order to be enforceable is required to be in writing or it may be one which is valid though it is not in writing. If it is one which is required to be in writing and is not in writing it is unenforceable and cannot be treated as evidence that the original contract has been rescinded, and the original contract, therefore, remains in force. But if the new agreement is in writing, or, if verbal, is one which need not be in writing, the new agreement is valid and the original contract is rescinded."

My Lords, I find myself unable to agree with this statement of the law, which appears to me, to begin with, to put absolute rescission on the same footing with variation. In so far as it does this it is inconsistent with the authorities in the Court of Chancery to which I have referred and which were, in my opinion, correctly applied by Byrne J. in *Vezey* v. *Rashleigh*. (1) Nor does it, for the reasons I have already given, appear to me to derive any support from *Noble* v. *Ward* (2), or for that matter from the preponderance of the views expressed in the earlier decisions of the common law Courts which were cited and considered in the course of the latter case.

But the difficulty does not end here. If the Divisional Court were right, an agreement which is not in writing, and if it stood by itself would not be required to be so by the statute, can vary the terms of an antecedent agreement put into writing so as to comply with requirements imposed by the statute. This appears to me, for reasons which I have already stated, to be at variance with both principle and authority, and I cannot assent to the proposition.

(1) [1904] 1 Ch. 634. (2) L. R. 1 Ex. 117; L. R. 2 Ex. 135.

Now the Court of Appeal in the present case adopted the views of Shearman J. and Sankey J. as expressed in the passages I have cited from their judgments, and I am therefore compelled to differ from the opinion they have expressed as a statement of the law upon the subject.

My Lords, I have come to the conclusion that what happened in April, 1915, as evidenced by the letter of April 22, amounted to a complete rescission and abandonment of the old agreement of September 24, 1914, and the substitution of a completely new and self-contained agreement. The letter purports to set out the result of a conversation between the representatives of the appellant and the respondents which took place just before it, and it is of course the only admissible evidence of the terms then arranged. The proceedings in the old action are to be withdrawn and the sum of 30*l.* is to be allowed to the respondents to meet expenses incurred through not being able to fulfil orders, because, no doubt, of the asserted breach of contract by the appellant.

Then the amount due to the appellant on his account for goods already delivered is to be left over for three months so as to give to the respondents the opportunity of selling the goods already delivered, and the goods not delivered are to be kept for the respondents if they choose to ask for them. I think that there is here, in the first place, a good accord and satisfaction after breach which discharged any right of action for damages which had accrued to the respondents. In the second place, I think that although the letter does not, so far as liability on the part of the appellant is concerned, comply with the requirements of the Sale of Goods Act, either as regards signature or as regards sufficiently setting out the description of the goods or all the terms of the bargain relating to them, it not the less discloses a definite and self-subsisting parol agreement to abrogate altogether the existing arrangements under the agreement of September 24, 1914, which was no longer to be in force. I draw the inference from the letter as read with reference to the circumstances of the case that the new arrangement was to be a complete settlement of the dispute and to initiate new relations between the parties.

If I am right in this, the appeal succeeds and should be allowed with costs.

H. L. (E.)
1917
MORRIS
v.
BARON AND COMPANY.

LORD DUNEDIN. My Lords, I do not recapitulate the circumstances of the case, as they have been fully set out by the noble Lord on the woolsack. For the sake of clearness and brevity I shall call the contract of September 24, 1914, contract A and the agreement of April 20, 1915, contract B. As to contract B, there is no memorandum in writing sufficient to satisfy s. 4 of the Sale of Goods Act, if that section applies to it; and its terms have been held to be for the purposes of this case set out in the letter of April 22, 1915. It is admitted that (1.) the legal proceedings which had been instituted in respect of breaches of contract A, which consisted of claim and counter-claim, were withdrawn; (2.) the account for goods delivered under contract A was left over for three months; (3.) 30*l.* was allowed in credit by the plaintiff to the defendants. Upon these facts the case falls to be decided.

My Lords, the case raises points of law of great nicety, chiefly for the reason that there is a mass of authority, not always consistent, dealing with questions akin to the questions here raised; and that there is a great responsibility on any one in your Lordships' House who attempts to lay down general rules, and in so doing may seem to run counter to the dicta of learned judges in the past. Nor has the case been made easier by the somewhat peculiar manner in which it was treated by the parties and, in consequence of their attitude, by the Courts below.

The action is for the value of goods sold and delivered to the amount of 888*l.* 4*s.* It is not expressly founded on any contract, although the goods were doubtless delivered under contract A. The defence admits the claim as for goods sold and delivered, then sets out contract B, and averring breach counter-claims under that contract. It is true that in the pleading there is made an alternative claim as for breach of contract A, but before the trial judge the whole case for the counter-claim was put and urged on the assumption that contract B was the ruling contract and that the breach had taken place under it. The trial judge found in fact that in terms of contract B the defendants were bound to pay 888*l.* at the end of July, being the date of the expiry of the three months; that they positively refused to do so; and on these facts he held that the counter-claim failed. It is a little difficult to say whether the learned judge held the counter-claim to fail because this maintained attitude

of the defendants amounted to a repudiation of the contract; or upon the ground that as the defendants never asked for delivery, except coupled with the assertion that they refused to pay the 888*l.* until delivery was made, that was tantamount to the defendants never really asking for delivery at all. On the learned judge's announcing his decision counsel for the plaintiff said that he had a point which he had not been able to bring forward, namely, that contract B was unenforceable under the 4th section of the Sale of Goods Act, and therefore could not be the foundation of a counter-claim. To this counsel for the defendants retorted that if that were so he might go back to the original contract, to which counsel for the plaintiff replied that he was prepared to deal with that argument. The matter then dropped.

In the Court of Appeal, the learned judges having seemingly indicated that they were not prepared to agree with the view of the learned trial judge as to the application of the facts to contract B, the plaintiff brought forward his argument that s. 4 of the Sale of Goods Act applied to contract B. This was resisted by the defendants' counsel, as appears from the judgment of Swinfen Eady L.J., who says: "The question is, was the contract of April 22 an agreement which is within the section and ought it to be in writing? Was it an agreement for the sale of goods? It is contended by the defendants that it was not." The defendants, however, found salvation in the defeat of their argument, for the Court of Appeal, deciding against them that contract B did fall within the section, proceeded to say that the case was ruled by the case of *Noble* v. *Ward* (1), and gave judgment for the counter-claim upon the alternative plea for breach of the original contract A, a view which seems to have been unpressed by the defendants themselves. Accordingly, as the appeal now stands before your Lordships' House, the question to be first decided is whether, assuming that contract B is within the section, the present case really falls within the decision in *Noble* v. *Ward*. (1)

My Lords, let me first say that I unhesitatingly accept *Noble* v. *Ward* (1) as well decided and laying down correct law. The judgment in the Exchequer was the judgment of Pollock C.B. and Bramwell, Channell, and Pigott BB. In the Exchequer Chamber

(1) L. R. 1 Ex. 117; L. R. 2 Ex. 135.

H. L. (E.) 1917 MORRIS v. BARON AND COMPANY. Lord Dunedin.

the judgment was given by Willes J., and was concurred in by Blackburn, Mellor, Montague Smith, and Lush JJ. He would be a bolder iconoclast than I am who should say that a judgment resting on the authority of such names did not correctly set forth the law of England. But now comes the question of what exactly it was that *Noble* v. *Ward* (1) decided, and that is not so easy to determine as might be expected. For in truth there are three possible views of the true effect of *Noble* v. *Ward*. (1) I shall examine each of them. First, there is the view, strongly contended for by the appellant at your Lordships' Bar, that, inasmuch as the transaction in that case fell within the 17th section of the Statute of Frauds, which uses the expression "No contract . . . . shall be allowed to be good except," &c., it was entirely void, and as such could effect nothing either by way of rescission or variation of the anterior contracts: and that as the 4th section of the Sale of Goods Act, like the 4th section of the Statute of Frauds, does not make void a contract, but only prevents enforcing it, contract B in this case, though not enforceable, might yet serve as a defence to get rid of contract A.

My Lords, it is quite true that in the Exchequer Chamber Willes J. uses the expressions "invalid" and "void," and I confess if I could have read the case as reported in the Exchequer Chamber apart from all other authority, I should have come to the conclusion that that was the ground of judgment, and that, to say the least of it, the question was still open when you had something to which s. 4 applied and s. 17 did not. But, on the best consideration I can give, I do not think that would be a safe view. For Lord Blackburn, who was a party to the judgment, distinctly said in the case of *Maddison* v. *Alderson* (2) in this House: "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." And Brett L.J. in *Britain* v. *Rossiter* (3) says: "In my opinion no distinction exists between the 4th and the 17th sections of the statute."

In view of these opinions I am inclined to think that although,

(1) L. R. 1 Ex. 117; L. R. 2 Ex. 135.

(2) 8 App. Cas. 467, 488.

(3) 11 Q. B. D. 123, 127.

doubtless, *Noble* v. *Ward* (1) proceeded on the 17th section, yet the judgment would have been the same had there only been the 4th in question.

The second interpretation is that which the Court of Appeal have here given, adopting and relying on the views of Shearman and Sankey JJ. in the case of *Williams* v. *Moss' Empires, Ld.* (2) It is most succinctly put by Sankey J. in that case: "A contract which in compliance with the Statute of Frauds is in writing may be rescinded by a new agreement. The new agreement may be one which in order to be enforceable is required to be in writing, or it may be one which is valid though it is not in writing. If it is one which is required to be in writing and is not in writing, it is unenforceable and cannot be treated as evidence that the original contract has been rescinded, and the original contract, therefore, remains in force. But if the new agreement is in writing, or, if verbal, is one which need not be in writing, the new agreement is valid and the original contract is rescinded." It must be kept in view that this statement of the law is given after Shearman J. had cited the series of cases *Goss* v. *Lord Nugent* (3), *Noble* v. *Ward* (1), *Stead* v. *Dawber* (4), *Giraud* v. *Richmond* (5), *Marshall* v. *Lynn* (6), and *Stowell* v. *Robinson.* (7) It will be noticed at once that the learned judge ignores the distinction between variation and rescission. The contract with which he was dealing was obviously a case of variation. There had been an engagement for three years at a certain salary. A verbal arrangement was made whereby the amount of salary was altered; all other terms of the original contract remained. Indeed, the learned judge says in so many words that no such distinction exists where the alteration is a material one. He says: "I think some confusion has arisen from the use of the words 'variation of a contract.' The result of varying the terms of an existing contract is to produce, not the original contract with a variation, but a new and different contract."

My Lords, I find myself unable to subscribe to this view. The difference between variation and rescission is a real one, and is

(1) L. R. 1 Ex. 117; L. R. 2 Ex. 135.
(2) [1915] 3 K. B. 242, 248.
(3) 5 B. & Ad. 58.
(4) 10 Ad. & E. 57.
(5) (1846) 2 C. B. 835.
(6) (1840) 6 M. & W. 109.
(7) (1837) 3 Bing. N. C. 928.

H. L. (E.) 1917

MORRIS v. BARON AND COMPANY.

Lord Dunedin.

tested, to my thinking, by this: In the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself.

Now each and every of the cases cited (leaving aside for the moment *Noble* v. *Ward* (1)) were attempts to vary; in not one of them was it a case of rescission. *Noble* v. *Ward* (1), though also a case of attempted variation and decided as such, yet had in it the distinction which Shearman J. ignores. In that case there were what Lord Bramwell called contracts A, B, and C. A and B were in writing, C was a parol contract. It was entered into when A and B were both extant and partially performed. Now it was held that C could not vary B, but there was no difficulty made as to its rescinding A. I do not mean that this was decided upon adverse contentions, for neither party maintained that A was to go on. But still the only thing that rescinded or abrogated A was C, and had the plaintiff in that case claimed damages under A as well as under B I do not doubt that the plea that A was abrogated would have been sustained. This brings me to the third view of *Noble* v. *Ward* (1), which I humbly think is the correct one. The criterion does not lie in the question of whether the later contract is itself a contract which needs to be in writing. The criterion is in the question whether what is intended to be effected by the second contract is rescission or variation. *Noble* v. *Ward* (1) decided that if the second contract fell within the statute then it could not be appealed to to vary the former; but it did not decide that it could not be appealed to to rescind.

Willes J., in giving judgment and speaking of the later contract, and of the fact that a verbal contract to rescind simpliciter was quite good, says: "But it would be at least a question for the jury,

(1) L. R. 1 Ex. 117; L. R. 2 Ex. 135.

whether the parties did intend to rescind." That contract B, if it falls within s. 4, is not gone altogether although not enforceable is clear from the passage already cited from Lord Blackburn, and the like is said in the same case by Lord Selborne (1): "It has been determined at law (and, in this respect, there can be no difference between law and equity) that the 4th section of the Statute of Frauds does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced." If, then, the contract exists its existence must be treated as a fact, and it must be looked at to see if apart from enforceability it did or did not put an end to the former contract. For it would be an extraordinary result that although a parol contract to rescind a written contract is good, as to which there is no doubt (*Goman* v. *Salisbury* (2) and Willes J. in *Noble* v. *Ward* (3)), yet the same thing cannot happen if after rescinding the first contract the parties go on to make another contract which may or may not be enforceable. Accordingly, if express words to that effect are used there can be no doubt. It seems to follow that implication may do as well as express words. But here there must be a note of warning. If the implication be no more than this, that the second contract if valid would displace the first, that by itself is not enough, for, as Willes J. says in *Noble* v. *Ward* (4), "It is quite in accordance with the cases of *Doe* d. *Egremont* v. *Courtenay* (5) and *Doe* d. *Biddulph* v. *Poole* (6), overruling the previous decision of *Doe* d. *Egremont* v. *Forwood* (7), to hold that, where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold that there was no such intention." The cases there cited are all cases of surrenders of leases upon new leases granted in which it was held that the surrender, whether express or implied, was conditional upon the new lease being good.

I now turn to the facts in this case. There had been alleged

(1) 8 App. Cas. 474.
(2) (1684) 1 Vern. 240.
(3) L. R. 2 Ex. 135.
(4) L. R. 2 Ex. 138.
(5) (1848) 11 Q. B. 702.
(6) (1848) 11 Q. B. 713.
(7) (1842) 3 Q. B. 627.

H. L. (E.) 1917 MORRIS v. BARON AND COMPANY. Lord Dunedin.

breach of contract A on both sides, and action raised with counter-claim. Now the first term of the new contract B is to put each party to withdraw legal proceedings; then to give three months' credit to the defendants in the payment of a sum admittedly due for goods already delivered; then to allow them 30*l.* in satisfaction of the expenses they had incurred by reason of non-delivery under contract A; and lastly to substitute for the right of the plaintiff to supply and the duty of the defendants to take 277 pieces of cloth, an option on the defendants' part to take them if they pleased.

My Lords, it seems to me impossible to come to any conclusion on this but that the parties agreed that the old contract should be abrogated. I use the word "abrogate," because I think it is a better word than "rescind" when you deal with a contract which has been partly implemented, but as regards the authorities I might as well say "rescind." Further, as regards this arrangement there cannot be a restitutio in integrum. The defendants have had the extended credit, have had the 30*l.* placed to their credit, and have enjoyed an option not to take, which, if the market had been a falling one instead of a rising one, they would probably have availed themselves of; and these advantages have been enjoyed and cannot be taken away. In respect of these things the old contract was to be held abrogated. But the judgment of the Court of Appeal leaves the defendants with all these advantages and yet holds the old contract binding still.

I am fortified in my view by a passage in Fry on Specific Performance (3rd ed.). Sect. 1039 is as follows: "But where the new contract is relied on only as an extinguishment of the old one, the mere fact that it is not in writing, and so could not be put in suit, seems to be no ground for denying its effect in rescinding the original contract. The Statute of Frauds does not make the parol contract void, but only prevents an action upon it; and it does not seem to be necessary to the extinction of one contract by another that the second contract could be actively enforced. The point has never, it is believed, been matter of decision. But in point of principle it seems to stand on the same footing as a simple agreement to rescind."

I am therefore of opinion that the present case is not ruled by *Noble* v. *Ward* (1), because the question here is not whether contract

(1) L. R. 1 Ex. 117; L. R. 2 Ex. 135.

A was varied by contract B, but whether it was rescinded by contract B, and on the facts I hold that it was.

There remains the question whether the defendants can sue for breach of contract B in so far as that contract is a contract for sale of the 277 pieces of cloth. I think they cannot for several reasons. In the first place, I think, though with some hesitation, that it falls within the 4th section of the Sale of Goods Act, and cannot therefore, being a parol contract, be actively enforced. I say "with some hesitation," because, looking at the 4th section, I cannot help feeling that the section was meant to deal with what I may call pure contracts of sale, and not contracts dealing with other arrangements as well; and I have felt doubts as to whether when, as here, you have a composite arrangement, dealing with the getting rid of competing claims under an old contract as well as providing for the supply of goods in the future by way of sale, the section ought to apply. But on the whole I have come to the conclusion that in so far as implement of that portion which is sale is asked the section must apply. But further and apart from that, and taking the case as it was taken by Bailhache J., I agree with the conclusion he reached. I think that the maintained attitude of the defendants under no circumstances to pay the 888*l.* unless delivery were first made was equivalent to repudiation, but I do not find such an unqualified acceptance on the plaintiff's part of that repudiation as to amount to rescission. But I think also that the payment of the 888*l.* at the end of the three months was a consideration going to the root of the contract because it was the counterpart of the plaintiff's forbearance to sue and the grant to the defendants of an option to take instead of the old duty to take, and that it was not in the position of an ordinary payment of instalment which would make the case fall within the lines of *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1) Accordingly, being a stipulation going to the root of the contract, the defendants have all along been in breach, and cannot call on the plaintiff to implement his part; and thus there can be no damages.

LORD ATKINSON. My Lords, I concur.

The facts of this case have been already stated, and it is unneces-

(1) 9 App. Cas. 434.

H. L. (E.) 1917 MORRIS v. BARON AND COMPANY. Lord Atkinson.

sary to repeat them, or the criticism, in which I concur, on the authorities cited. It is well established, and was not questioned in argument on this appeal, that the parties to an agreement reduced into writing may rescind that agreement by a parol agreement subsequently entered into by them with that specific intention. There can be no doubt that it is quite competent to the parties to a written agreement to say by parol, "Let us put an end to this agreement," and if that be so, it is, I think, equally competent for them to say by parol, "Let us put an end to this agreement, start afresh, and make an agreement to a particular effect in substitution for the first." In my view this would be so though it might happen that, owing to some statutory provision such as that contained in the 4th section of the Statute of Frauds, the parol agreement could not, by reason of its not being evidenced in a particular way, be enforced at law, provided the intention of the parties to rescind the first be clear. And this, too, whether the second agreement was entered into before or after a breach of the first.

If the parol agreement were absolutely void it might possibly be otherwise; but owing to the terms of s. 4 of the Sale of Goods Act, 1893, this latter question does not arise in this case, and it is not, in my view, necessary to decide it. That section merely enacts that a contract for the sale of goods of the value of 10*l.* or upwards shall not be enforceable by action unless one of several things occurs, namely, unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment of it, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf. The very fact that it can be enforced by action if any one of these several things be done goes to show that the contract itself is, under this section of the statute, a valid contract, whatever contracts of the like nature may have been under the 17th section of the Statute of Frauds. In *Maddison* v. *Alderson* (1) Lord Blackburn said: "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." I do not

(1) 8 App. Cas. 467, 488.

find that it was ever seriously questioned that this was the true state of the law as to the 4th section of the Statute of Frauds. The doubt was as to whether the same rule applied to the 17th section, or whether contracts within it not in writing where none of the particular matters specified had been done were not absolutely void. There is nothing in all this inconsistent with the well established rule that a contract which the law requires to be evidenced by writing cannot be varied by parol: *Goss* v. *Lord Nugent* (1); *Stead* v. *Dawber* (2); *Noble* v. *Ward* (3); *Sanderson* v. *Graves.* (4) The foundation, I think, on which that rule rests is that after the agreed variation the contract of the parties is not the original contract which had been reduced into writing, but that contract as varied, that of this latter in its entirety there is no written evidence, and it therefore cannot in its entirety be enforced. There is a clear distinction, however, between cases such as these and cases like *Ogle* v. *Earl Vane* (5), where one party at the request of and for the convenience of the other forbears to perform the contract in some particular respect strictly according to its letter. As, for instance, where one party, bound to deliver goods sold upon a certain day, at the request of and for the convenience of the other postpones delivery to a later day. In such a case the contract is not varied at all, but the mode and manner of its performance is, for the reasons mentioned, altered. Moreover, rescission of a contract, whether written or parol, need not be express. It may be implied, and it will be implied legitimately, where the parties have entered into a new contract entirely or to an extent going to the very root of the first inconsistent with it: *Hunt* v. *South Eastern Ry. Co.* (6); *Thornhill* v. *Neats.* (7) I now turn to the new agreement entered into in the present case on April 20, 1915, and contrast its provisions with those of the original contract. For the purpose of this comparison I assume that the new agreement is correctly embodied in the letter of the respondents dated April 22, 1915, by which date I shall hereafter describe it.

Antecedent to that date 223 pieces of the serge purchased had

(1) 5 B. & Ad. 58.
(2) 10 Ad. & E. 57.
(3) L. R. 1 Ex. 117; L. R. 2 Ex. 135.
(4) (1875) L. R. 10 Ex. 234.
(5) L. R. 2 Q. B. 275; L. R. 3 Q. B. 272.
(6) (1875) 45 L. J. (Q.B.) 87.
(7) (1860) 8 C. B. (N.S.) 831.

H. L. (E.) 1917

MORRIS v. BARON AND COMPANY.

Lord Atkinson.

been delivered, irregularly, no doubt, and occasionally behind time, but still delivered and accepted, the contract price of which amounted to 888*l.* 4*s.* The last delivery took place on March 6, 1915. In the months of December, 1914, and January, 1915, the respondents were pressing for more regular and speedy deliveries of the goods, and the appellant was pressing for the payment of the price of those delivered. In the respondents' letter of January 28, 1915, they assert the rights they claim to exercise. The important passage runs thus: "Re your account which is due to-day, we beg to draw your attention to the fact that after all your repeated promises you are not delivering as you should, and we consider it perfectly right from our part to hold this money over until you fulfil your deliveries up to date."

The sum which the respondents then owed was, as appears from the appellant's statement of claim of March 19, 1915, 563*l.* 6*s.* 5*d.* Three deliveries of goods were made subsequently to the date of this letter, the contract price of which amounted to 324*l.* 10*s.* 7*d.* On March 19, 1915, the appellant instituted an action to recover this sum of 888*l.* 4*s.*, the contract price of all the goods delivered and then unpaid for. The respondents on April 17, 1915, delivered their defence and counter-claim. They did not dispute the appellant's claim for 888*l.* 4*s.* On the contrary, they admit it subject to their counter-claim. In their counter claim they set forth the substance of their contract of September 24, 1914. They state that under it the price of the serge to be delivered was 1*s.* 5*d.* per yard, that 10 pieces of blue serge and 15 pieces of grey were to be delivered within four days of its date, 10 additional pieces of blue serge within seven days of its date, and the remainder of the 500 pieces at the rate of 40 to 50 pieces per week from the expiry of this period of seven days, and that payment for the pieces delivered was to be made one month after delivery, less $2\frac{1}{2}$ per cent. discount. They then aver that the appellant had delivered 223 of the 500 pieces, but failed to deliver 277 pieces, that the market price of the serge had risen to 2*s.* 2*d.* per yard, being 9*d.* per yard higher than the contract price, and they claimed to recover that difference on the 24,930 yards comprised in the undelivered pieces. Now it will, I think, be found that every important provision of this contract of September 24, 1914, is in conflict with the provisions of the new

agreement of April 22, 1915, save and except the price of the serge.

First, the sum admitted to be due, 888*l.* 4*s.*, is not to be paid at once, though the time for payment under the contract of September had long passed, but the respondents are to have three months extended credit for the payment of it. Secondly, the respondents are released from all obligations to take delivery of any portion of the undelivered 277 pieces. Thirdly, the appellant is released from his obligation to deliver the portion of those pieces, already manufactured, at the rate of 40 or 50 per week, or at any other specified rate. Fourthly, the goods already manufactured are to be kept for the respondents if they ask for them. No time is mentioned within which they must ask for them, if at all, and it is not very clear what this provision really means. It is certain, however, that it is inconsistent with the provision of the earlier agreement of September, and the respondents are given an option, to be exercised presumably within a reasonable time, to demand delivery of the residue of the goods then unmanufactured, giving the time necessary for their manufacture. In addition the legal proceedings are to be withdrawn, all claim for damages to be abandoned. A sum of 30*l.* is to be paid to the respondents, not as damages properly so called, but to meet the expenses incurred through this not fulfilling of the orders, i.e., presumably the respondents' order or demands for delivery; and, lastly, the appellant and respondents are respectively to bear their own costs.

It is quite impossible, in my opinion, to reconcile the agreement of April 22, 1915, with that of September 24 previous. With the exception already pointed out as to price, they are in conflict in all those material and fundamental provisions which go to the root of each of them. It is, I think, impossible to arrive at any rational conclusion as to the meaning, aim, and effect of this new arrangement other than this, that it was the clear intention of both the appellant and the respondents to put aside, in their future dealings, the original agreement, and to treat it thenceforth as abandoned or non-existent.

The contract of April 22, 1915, is not an invalid contract, since it could be enforced in its entirety against the respondents, who have in their signed letter of that date provided a memorandum of its

H. L. (E.) 1917 MORRIS v. BARON AND COMPANY. Lord Atkinson.

contents sufficient, as against them, to satisfy the statuté; but if so, it must rescind by implication the earlier contract over which it is to prevail and with which it is in conflict. The fact that the respondents, if they desired to enforce it in a Court of law against the appellant, would not have the written evidence necessary to prove it, cannot, in my view, prevent its operating as an implied rescission of the earlier agreement. Indeed, all the correspondence of the parties subsequent to its date so treats it. The earlier agreement is never referred to as regulating their respective rights and obligations. It seems to be treated as abrogated and abandoned.

The inclination of my opinion is that this new agreement is an agreement for the sale of goods within the meaning of the 4th section of the Sale of Goods Act, and is not of the nature of the agreement dealt with in *Foster* v. *Dawber* (1), *Dobson* v. *Espie* (2), and *Williams* v. *Stern*. (3) For these reasons, apart from others, I think the decision of the Court of Appeal enabling the respondents to sue by counter-claim for the breach of the agreement of September 24, 1914, was erroneous and should be reversed. Bailhache J., as I understand his judgment, practically nonsuited the respondents on their own case in support of their counter-claim on the ground that they did not before the end of July, 1915, nor since, ever give a firm order for the delivery of the goods under the agreement of April 22, 1915; that, on the contrary, on July 28, 1915, although the period of their extended credit had elapsed, they wrote that they would pay the appellant's account if he delivered the balance of the blue pieces to complete the order stated in the letter of April 22, 1915. So that, taking that letter as a full embodiment of the terms of the new contract, the respondents were acting in violation of it and repudiating it, since they were bound to pay the sum of 888*l.* 4*s.* for the goods actually delivered to them and admitted by them to be due, whether the whole or any portion of the remaining 277 pieces were delivered or not. They adhered to the attitude thus taken up to the end. The Court of Appeal differed with the learned judge on this point. They held that the respondents by their letter of August 17, 1917, if not by their earlier letters, did clearly exercise the option reserved to them by the agreement of

(1) (1851) 6 Ex. 839. (2) (1857) 2 H. & N. 79.
(3) (1879) 5 Q. B. D. 409.

April 22, 1915. The first paragraph of that letter ran thus:— "Gentlemen,—We are surprised you have not replied to our letter of the 28th July. As explained in that letter we shall be glad to pay your account on delivery of the balance of the pieces to complete the order." The second thus: "As you have not answered we must now ask you to deliver the balance of the blue pieces on or before the 21st September, 1915. Kindly let me know by return of post if you will do this."

Having regard to this latter paragraph I concur with the Court of Appeal. I think the letter amounted to a firm order, notwithstanding that it was accompanied by an illegal claim to refuse to pay the 888*l.* 4*s.* until the balance of the pieces had been delivered. The result, in my opinion, is that the respondents cannot support a counter-claim based either upon the earlier or upon the later agreement. Not on the former, because it has been rescinded, not upon the latter, because they cannot prove it in a Court of law by a note or memorandum in writing, signed by the party to be charged as defendant in that suit by counter-claim, namely, the present appellant. The respondents will, of course, have to pay the sum of 888*l.* 4*s.*, the price of the goods they have received. The law as to the accord and satisfaction of a breach of an agreement was much discussed in argument. There is no doubt that the general principle is that an accord without satisfaction has no legal effect, and that the original cause of action is not discharged as long as the satisfaction agreed upon remains executory. That was decided so long ago as 1611 in *Peytoe's Case.* (1) If, however, it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise and not the performance of that promise, the original cause of action is discharged from the date when the promise is made: *Sibree* v. *Tripp* (2); *Hall* v. *Flockton* (3); *Evans* v. *Powis.* (4) In the view I take as to the rescission of the original contract, it is unnecessary for me to express an opinion as to whether the agreement of April 22, if it had not amounted to a rescission of the earlier one, would have come within the principle of these authorities; but questions were raised as to which no authority was cited, and which, now that the

(1) (1611) 9 Rep. 77b, 79b.
(2) (1846) 15 M. & W. 23.
(3) (1851) 16 Q. B. 1039 (Ex. Ch.).
(4) (1847) 1 Ex. 601.

H. L. (E.) 1917 MORRIS v. BARON AND COMPANY. Lord Atkinson.

principles of equity prevail over those of common law in all Courts, may some day call for decision. They are of some nicety. They are these. If in cases of the kind first above mentioned part of the satisfaction or the accord be given and accepted as such, but the whole has not been given, so that the new contract is not completely performed, can the person accepting the part performance sue upon the original cause of action without restoring or giving credit for what he has received to him who gave it, and if the part performance be of such a nature that it cannot be restored or given credit for, and the parties be put in the same position as they occupied when the original breach was committed, can the original cause of action be sued upon ? And again, in cases of the second class, can the original cause of action be sued upon if the agreement accepted in accord and satisfaction be such that, though valid, it cannot be sued upon inasmuch as a memorandum of it has not been signed by the party to be charged, though it is not in itself an invalid contract ? I abstain from expressing any opinion on any of these points in the desire to preserve my freedom of action, should they hereafter arise before me for decision.

The appeal should, I think, be allowed with costs here and below.

LORD PARMOOR (1) (after stating the facts as above). My Lords, in my opinion, the determining factor, on which the appeal depends, is the intention of the parties at the time when the parol arrangement was made in April, 1915. This question is one of fact, and depends on the conclusions to be drawn from the acts and conduct of the parties. The parol arrangement does not comply with the conditions of s. 4, sub-s. 1, of the Sale of Goods Act, 1893, and, if it is to be regarded as a contract of sale, is consequently not enforceable by action against the appellant. I think that in substance the contract is a contract of sale, and therefore within s. 4, sub-s. 1, of the Sale of Goods Act, 1893. Some question was raised at the hearing before your Lordships as to the terms of the parol arrangement. The case has, however, proceeded throughout on the basis that these terms are contained in the note of April 22, 1915, and it is unnecessary to further consider the evidence under this head. There can be no doubt that, if it is admissible in evidence, the crucial

(1) Read by Lord Dunedin.

factor, in determining the conclusions to be drawn from the acts and conduct of the parties, is the parol arrangement. If this arrangement expressed in clear language an intention to rescind the earlier contract in September, it would, in the absence of explanation, be decisive. I am unable to understand any principle on which it can be said that the terms of the parol arrangement are not admissible in determining the intention of the parties in April, 1915. If a factor of such importance was eliminated from consideration under any technical rule, there would be great danger of coming to a conclusion contrary to that which was really intended by the parties. I can find no authority for any such proposition, and it is not to be found in the decision of *Noble* v. *Ward* (1), to which frequent reference was made during the hearing of the argument. With all respect to the opinion of Sankey J. in the case of *Williams* v. *Moss' Empires, Ld.* (2), I cannot agree that if a subsequent contract is unenforceable, as being one which is required to be in writing, and is not in writing, it cannot be treated as evidence that the original contract has been rescinded, and the original contract therefore remains in force. In his judgment in the Court of Appeal Bankes L.J. approved the opinion of Sankey J., but, as stated above, it does not appear to me to be correct, or supported by authority.

The next point which arises for consideration is whether, taking into consideration the parol arrangement of April as part of the acts and conduct of the parties, there was an intention to rescind the earlier contract of September, 1914. The note of April 22, 1915, was drawn up in confirmation of terms agreed upon to compromise an action brought, and a counter-claim made, on the September contract. It provides that both parties shall withdraw the legal proceedings on terms, each party to pay his own costs and the appellant to allow 30*l.* to the respondents to meet expenses incurred through not fulfilling the orders. I agree in the construction placed by Mr. Tindal Atkinson on the latter portion of the terms of the note. The account due to the appellant is to be left over for three months so as to give the opportunity of selling the goods—that is to say, the goods already delivered to the respondents. The goods not delivered to the respondents are to be kept for them if they ask for them. A further option is given to the respondents of

(1) L. R. 1 Ex. 117; L. R. 2 Ex. 135. (2) [1915] 3 K. B. 242.

H. L. (E.) 1917 MORRIS v. BARON AND COMPANY. Lord Parmoor.

taking up the balance of pieces to complete the order, giving time to make. It is clear that these terms are an alteration of the September contract, but this in itself would not be sufficient to support the plea of rescission. It is necessary further to inquire whether the conditions have been so changed in their essential character that there is a substantial inconsistency, such as to lead to the inference that the parties did intend to rescind the earlier contract of September. It is not possible to lay down any general principle, but where the alteration is such that the conditions of the earlier contract cannot be restored without placing one of the parties under a permanent and substantial disability there is a strong prima facie probability of an intention to rescind. This factor applies in the present case, and is supported, not only by the acts and conduct of the parties at the time, but by the whole course of their subsequent acts and conduct. The case before Bailhache J. was fought on the construction of the April contract, and I cannot find that the September contract was regarded as material until this issue was raised in the argument before the Court of Appeal. It was pointed out in argument that the April contract refers to the earlier contract, but the answer is that it does so only so far as is necessary to identify the subject-matter, and that from a business aspect the two contracts are essentially different. I have therefore come to the conclusion that it was the intention of the parties at the time when they made the parol contract in April, 1915, to rescind and put an end to the earlier contract of September, 1914.

To prevent misapprehension I desire to refer to the later portion of the judgment of Swinfen Eady L.J., in which he refers to the case of *Noble* v. *Ward* (1) and the opinion stated by Shearman J. in the case of *Williams* v. *Moss' Empires, Ld.* (2) In my opinion the case of *Noble* v. *Ward* (1) was decided on the ground that it was the intention of the parties in the subsequent contract not to rescind the earlier contract, but only to vary it. It is a settled principle that a contract, which is required to be in writing, and is not in writing, cannot vary the terms of an earlier contract, where such earlier contract is required by statute to be in writing in order to be enforceable by action. If, therefore, the right conclusion should be that the parties intended not to rescind the earlier September contract,

(1) L. R. 1 Ex. 117; L. R. 2 Ex. 135 (2) [1915] 3 K. B. 242.

but to introduce a variation in these terms, I think that the principle in *Noble* v. *Ward* (1) would have applied. There is no reason to dissent from the opinion expressed by Shearman J. in *Williams* v. *Moss' Empires, Ld.* (2) and approved by Swinfen Eady L.J., although, for the reasons given above, it is not, in my opinion, applicable to the present case. "The principle as laid down by Willes J., who delivered the judgment of the Court, in *Noble* v. *Ward* (3) is where there is alleged to have been a variation of a written contract by a new parol contract, which incorporates some of the terms of the old contract, the new contract must be looked at in its entirety, and if the terms of the new contract when thus considered are such that by reason of the Statute of Frauds it cannot be given in evidence unless in writing, then being an unenforceable contract it cannot operate to effect a variation of the original contract. That principle is to be found in a number of cases, which I need not refer to in detail." After referring to the cases of *Goss* v. *Lord Nugent* (4), *Stead* v. *Dawber* (5), *Giraud* v. *Richmond* (6), *Marshall* v. *Lynn* (7), and *Stowell* v. *Robinson* (8), the learned judge continues: "Those cases show that whenever the parties vary a material term of an existing contract they are in effect entering into a new contract, the terms of which must be looked at in their entirety, and if the new contract is one which is required to be in writing but is not in writing, then it must be wholly disregarded and the parties are relegated to their rights under the original contract." Unless the principle is maintained that it is not admissible to vary the terms of a contract in writing by a subsequent parol contract, which in itself would be required to be in writing to be enforceable, the safeguards provided either by the Statute of Frauds or the Sale of Goods Act, 1893, might be practically evaded and rendered of little value as a protection against fraud or to ensure certainty.

The case of *Noble* v. *Ward* (1) has been so fully considered by other members of your Lordships' House that it is unnecessary to refer further to it. There are, however, two cases to which I would desire

(1) L. R. 1 Ex. 117; L. R. 2 Ex. 135.
(2) [1915] 3 K. B. 242, 246.
(3) L. R. 2 Ex. 135.
(4) 5 B. & Ad. 58.
(5) 10 Ad. & E. 57.
(6) 2 C. B. 835.
(7) 6 M. & W. 109.
(8) 3 Bing. N. C. 928.

H. L. (E). 1917 — MORRIS v. BARON AND COMPANY. — Lord Parmoor.

to refer your Lordships. In *Goss* v. *Lord Nugent* (1) Denman C.J. says: "It should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing." In the case of *Maddison* v. *Alderson* (2) Lord Selborne states the law applicable to contracts not enforceable through non-compliance with statutory requirements: "It has been determined at law (and, in this respect, there can be no difference between law and equity), that the 4th section of the Statute of Frauds does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced: *Crosby* v. *Wadsworth* (3); *Leroux* v. *Brown* (4); *Britain* v. *Rossiter*. (5) *Crosby* v. *Wadsworth* (3) was an action of trespass brought by the trespasser against the vendor of a growing crop. The contract was by parol, and it was held to be concerning an interest in land, within the 4th section of the statute. 'But' (said Lord Ellenborough) 'the statute does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of actions to enforce them by charging the contracting party, or his representatives, on the ground of such contract, and of some supposed breach thereof; which description of action does not properly apply to the one now brought, viz., a mere general action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise.'" In the same case Lord Blackburn says: "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable, when it is sought to enforce the contract." It is not necessary further to consider the opinion so expressed by Lord Blackburn in the present case, but it is noticeable that Lord Blackburn had been a member of the Court when Willes J. gave judgment in *Noble* v. *Ward*. (6)

If the original contract of September, 1914, has been rescinded, and the later contract of April, 1915, is not enforceable against the

(1) 5 B. & Ad. 58, 66.
(2) 8 App. Cas. 467, 474, 488.
(3) (1805) 6 East, 602, 611.
(4) 12 C. B. 801.
(5) 11 Q. B. D. 123.
(6) L. R. 2 Ex. 135.

appellant as not complying with the conditions in s. 4, sub-s. 1, of the Sale of Goods Act, 1893, the appellant succeeds in his appeal. Assuming, however, that the case had to be determined on the terms of the later contract, I agree with the judgment of Bailhache J. Under the April contract the appellant was entitled to the payment of his account after a period of three months. Bailhache J. has found that during this period no firm offer was given to the appellant by the respondents under the contract, and that at the end of this period the appellant had done nothing in breach of his obligations. On July 27, 1915, the appellant wrote to the respondents claiming the payment to which he was then entitled under the April contract. On July 28 the respondents answered: "Referring to yours of yesterday's date, we shall be pleased to pay your account if you deliver the balance of the blue pieces to complete the order, as stated in our letter of April 22nd." This condition the respondents were not entitled to make, and they withheld payment because they conceived that they had a counter-claim for damages exceeding the amount of their indebtedness. In a letter of August 17th the respondents maintained the same attitude, and, although there was a subsequent attempt to settle, they did not recede from the view as to the nature of their rights stated in the letter of July 28. No firm order was ever given by the respondents in accordance with the terms of the April contract. They were insisting that they had a right to give an order, not under the terms of the April contract, but of a different contract to which the appellant had never been a consenting party. There was no justification for this attitude. The difference on which the respondents continuously insisted had reference to a matter of essential substance, namely, the claim of the appellant to be paid his account of 888*l.* 4*s.*, irrespective of further deliveries.

The question then arises whether the persistent maintenance of an untenable construction of a contract on a matter of essential substance should be regarded as not consistent with a continuing intention to observe the contractual obligations. I think that the answer should be in the affirmative. If this is so, the respondents could not substantiate their counter-claim for damages, even on the assumption that they were entitled to enforce their right under the April contract by action against the appellant. This conclusion

H. L. (E.) 1917

MORRIS v. BARON AND COMPANY.

Lord Parmoor.

renders it unnecessary to consider whether the payment of his account to the appellant was a condition precedent to the giving of a firm order under the contract, and I do not understand that the judgment of Bailhache J. depended on the acceptance of any such construction of the contract.

My Lords, in my view the appellant succeeds and the appeal should be allowed with costs here and below.

Order of the Court of Appeal reversed and judgment of Bailhache J. restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, Oct. 19, 1917.

Solicitors for appellant: *Ward, Bowie, Porter & Co., for Walter & E. H. Foster, Leeds.*

Solicitor for respondents: *F. B. Brook, for Albert V. Hammond, Bradford.*

[HOUSE OF LORDS.]

H. L. (E.)*
1917
Oct. 16.

WOODILEE COAL AND COKE COMPANY, LIMITED . . . . . APPELLANTS;

AND

M'NEILL . . . . . RESPONDENT.

Workman's Compensation—Assessment—Partial Incapacity—Rise in Wages since Date of Accident—Review of Weekly Payments—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., pars.* 1 (*b*), 3.

In assessing the compensation under the Workmen's Compensation Act, 1906, payable to a workman in respect of partial incapacity, subject to the statutory limitations as to the amount of compensation, a general rise or fall in the wages of the workman's trade is a factor which the arbitrator is entitled to take into account.

Bevan v. *Energlyn Colliery Co.* [1912] 1 K. B. 63 approved.

Jamieson v. *Fife Coal Co.* (1903) 5 F. 958 and *James* v. *Ocean Coal Co.* [1904] 2 K. B. 213 discussed and distinguished.

Decision of the Second Division of the Court of Session in Scotland affirmed.

APPEAL from a decision of the Second Division of the Court of Session upon a case stated by the Sheriff-Substitute of Stirling under the Workmen's Compensation Act, 1906.

The respondent, who was a miner in the employment of the appellants, contracted nystagmus on March 25, 1914, at which date his average weekly earnings were 40*s.* Under an award of the Court he was paid 20*s.* a week, which in May, 1915, was reduced to 15*s.* a week by an unrecorded agreement between the parties. On June 7, 1916, he had so far recovered that he was fit for labouring work on the surface, at which he was able to earn 27*s.* 6*d.* a week.

Upon an application by the appellants for a review of the weekly payment of 20*s.* the sheriff-substitute found that had it not been for his disablement the respondent would in all probability have continued to work as a miner at the face; that since the date of disablement there had been a general rise in the rate of miners' wages, and that the minimum wage of a miner at the face at the

* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD PARMOOR.

H. L. (E.) 1917

WOODILEE COAL AND COKE COMPANY v. M'NEILL.

time of the application to review was 10*s.* per shift; that had the respondent continued to work as a miner at the face he would now have been earning a weekly wage of considerably more than 55*s.* a week. The appellants contended that the compensation payable should be reduced to 6*s.* 3*d.*, being 50 per cent. of the difference between 40*s.* and 27*s.* 6*d.*, the amounts earned before and after the accident respectively. The respondent contended that in fixing the amount of compensation for partial incapacity the amount which he would in all probability have been earning had he not contracted nystagmus should be taken into account and that the rate of 15*s.* a week should be continued.

The sheriff-substitute held on the authority of *Bevan* v. *Energlyn Colliery Co.* (1) that within the limits of par. 3 of Sched. I. he was entitled to take into consideration a rise or fall of wages since the date of disablement, and he awarded the respondent 12*s.* 6*d.* a week, being the full amount of the difference between the wage he was earning at the date of the accident and the wage he was earning at the date of the review.

The question for the opinion of the Court was whether the general rise in miners' wages was a factor which the arbitrator was entitled to consider in assessing the compensation payable to the respondent in respect of partial incapacity.

The Second Division (the Lord Justice-Clerk, Lord Dundas, and Lord Hunter) answered this question in the affirmative and affirmed the determination of the sheriff-substitute.

Hon. William Watson, K.C. (of the Scottish Bar) (with him *F. T. Villiers Bayly*, for *Harold W. Beveridge*, serving with His Majesty's Forces), for the appellants. A variation in the rate of wages since the date of disablement is not a circumstance of the case within par. 3 of Sched. I. The arbitrator might have awarded the 12*s.* 6*d.*, as he has done, inasmuch as the amount does not exceed the statutory limits, but not for the reasons assigned; and the question put to the Court in the stated case is not whether the decision of the arbitrator is right, but whether his reasons are right. In *Jamieson* v. *Fife Coal Co.* (2) it was held incompetent to take into account a reduction in miners' wages in the district, and *James* v.

(1) [1912] 1 K. B. 63. (2) 5 F. 958, 961.

Ocean Coal Co. (1) is an English decision to the same effect. Those are decisions under the earlier Act, but for the present purpose there is no material difference in the language. The wage basis referred to both in par. 1 (*b*) and in par. 3 is the pre-accident wage basis, and, in effect, the arbitrator is varying the wage basis and so evading one of the maxima laid down in par. 1 (*b*). *Bevan* v. *Energlyn Colliery Co.* (2) decides that once the arbitrator is within the statutory limit he may ignore the basis of compensation. That, it is submitted, is wrong.

T. B. Morison, K.C. (Solicitor-General for Scotland), and *David R. Scott* (of the Scottish Bar), for the respondent, were not called upon.

LORD FINLAY L.C. My Lords, this case has been very clearly and very concisely presented to your Lordships, and in my opinion it is not necessary to call upon the other side, for I think the appeal fails.

The question turns on the effect to be given to par. 3 of the First Schedule of the Workmen's Compensation Act, 1906. That paragraph provides thus: "In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." My Lords, the latter part of that paragraph fixes the limits within which compensation may be given, and goes on to provide that within these limits such amount may be given as appears proper under the circumstances of the case. It is not suggested that the arbitrator in the present case has not strictly kept within these limits; he has: but it is said that, in giving the whole amount that the statutory limit under the paragraph which I have read permitted, he allowed himself to be influenced by a consideration of the amount which if the accident had not taken place the miner would now be earning; and it is

(1) [1904] 2 K. B. 213. (2) [1912] 1 K. B. 63, 68.

H. L. (E.) 1917

WOODILEE COAL AND COKE COMPANY v. M'NEILL.

Lord Finlay L.C.

said that he ought to have excluded that from consideration altogether. In support of that contention the case of *James* v. *Ocean Coal Co.* (1) is referred to. In my opinion that case has no application. What the arbitrator had done there was to take a starting point for ascertaining the maximum different from that which is prescribed in the schedule to the Act, and in doing that he was clearly wrong; and it was so held by the Court. The present is a totally different case, and in my opinion the decision in *Bevan* v. *Energlyn Colliery Co.* (2) was right. The matter is really a very simple one. Limits are fixed; then the question arises, Is the arbitrator to give the whole amount that these limits admit of or is he to cut it down? The parapraph says that he is to consider all the circumstances in fixing the amount, and I am unable to see on what principle it can be said that he is to exclude from his consideration the fact that but for the accident the miner would have been earning much larger wages. It does not, and of course it could not, enable him to exceed the maximum prescribed by the Act, and it is not contended that it would; but it may be taken into consideration by the arbitrator in determining whether he should allow the whole amount of the difference which is prescribed by the paragraph as the maximum, and in my opinion the arbitrator committed no error in point of law. I agree with what he says as to the law of the matter, and I agree with the judgments in the Court of Session affirming his decision.

VISCOUNT HALDANE. My Lords, I agree for the reasons which have been given by the Lord Chancellor.

The question which has been put is a general one, whether a rise in a miner's wages is a fact which the arbitrator was entitled to consider in assessing the compensation payable to the respondent in respect of his partial incapacity. It was decided by the Court of Appeal in *Bevan* v. *Energlyn Colliery Co.* (2) in 1911 under circumstances substantially similar to those before us—although the question was a question of fall and not of rise in wages—that it was competent to take the change into account, a decision which has been followed by the sheriff-substitute and by the Second Division in the case before us.

(1) [1904] 2 K. B. 213. (2) [1912] 1 K. B. 63.

My Lords, I think the decision was right. The statute lays down three conditions as to the maximum earnings; two of those are in s. 1 (*b*), the first relating to the 50 per cent. as the limit, and the second relating to the weekly payment not exceeding 1*l*. The third, that the weekly payment is in no case to exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is actually earning, occurs in another section of the statute, s. 3. But then at the end of that section, these general principles having been laid down, it is enacted that the weekly payment is to "bear such relation to the amount of that difference as under the circumstances of the case may appear proper." Now, my Lords, no limit is enacted by the statute as to the circumstances which are there to be taken into account; they are brought in by a proviso to the principles enacted concerning the maximum, and they seem to me to give the arbitrator a very wide discretion, provided he observes the principles which the statute makes binding on him as to the maximum itself.

My Lords, it has never been the practice of your Lordships' House to review the decision of a sheriff-substitute or an arbitrator under the Workmen's Compensation Act unless on the face of what he has done either there is apparent an error in principle such as vitiates the decision, or there was no evidence upon which he could properly act. But here I think that the decision in the case before the English Court of Appeal was a decision which went on the footing that all that the statute laid down as the law which restricts the decision of the arbitrator had been observed, and that the discretion which the concluding words of s. 3 confer upon him was a discretion that he was entitled to exercise freely.

My Lords, I agree with that view, and I have therefore come to the same conclusion as that reached by my noble and learned friend on the woolsack.

LORD DUNEDIN. My Lords, I concur. I find that in the case of *Bryson* v. *Dunn and Stephen* (1), I, while sitting in the Court of Session, said: "I do see this, that under the statute there is no limit to the considerations which arbiters may have before them,

(1) (1905) 8 F. 226, 230.

H. L. (E.) 1917

WOODILEE COAL AND COKE COMPANY v. M'NEILL.

Lord Dunedin.

and it is not for us here to set up a sort of model code for arbiters as to what they ought to think about."

My Lords, I still adhere to that opinion, but I think it is clear that when you come to the consideration of what the arbiter has held in view here it was a relevant consideration. What is the scheme of the statute? The first section of the statute says that if injury happens during employment and arising out of the employment there shall be compensation paid. Then the schedule proceeds to deal with the compensation, and the schedule says that where total or partial incapacity for work results from the injury a weekly payment shall be made not exceeding 50 per cent. of the average weekly earnings, and not exceeding 1*l*. Those are both negative provisoes, and leave the amount of the weekly payment undefined. Now the only other matter which bears light on it is the third paragraph, which tells the arbiter what he is to do in fixing the amount of the weekly payment: he is to have regard to what the employer may have paid voluntarily before. Then there is another limit that in no case shall it "exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn . . . . after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." Now, your Lordships will observe that still you are not told what the weekly amount is to be, and therefore the weekly amount must be something that represents the compensation.

Now, surely, supposing there had been no provisions as to cutting down by prescribing the maximum, the compensation would obviously have been a payment which should make up to the man for the fact that he is an injured man instead of a whole man, and when you put into money what is the difference between an injured man and a whole man you say, "As a whole man he would have been able to earn so much at this moment; as an injured man he can only earn so much"; and the difference is the compensation. So that the question of the actual wages at the time seems to me an absolutely relevant consideration in fixing what compensation is due. It is true that the matter cannot rest there, because the statute comes in and prescribes these various maxima which have been already alluded to by the noble and learned Lord who pre-

ceded me; but, provided that those maxima are not infringed, not only in my opinion is the arbiter left a free hand as to what are relevant considerations, but when I come to look at this particular consideration which is the de quo quaeritur in the present case, I think it is a most relevant consideration, and accordingly I entirely follow the reasoning of the learned judges in the Court of Appeal in England in the case of *Bevan* v. *Energlyn Colliery Co.* (1)

My Lords, I must just say one word more about a case which was cited by Mr. Watson, but which seems to have escaped notice in the discussion before the Court of Session. I mean the case of *Jamieson* v. *Fife Coal Co.* (2) I am sorry to say that I think there was some confusion in the minds of the very learned judges who decided that case as to what they had actually to decide. I have no doubt that the decision in *Jamieson* v. *Fife Coal Co.* (2) was right, because it is perfectly clear that what the arbiter there had done was to infringe the rule of the statute as to the maximum. The arbiter says this: "In the course of the proof the agents of the parties agreed that, for the purposes of the case, the appellant's average weekly earnings should be held to be 30*s*. On advising the case, as there was no note of this agreement in process, I fixed the appellant's average weekly earnings in the light of such evidence as had been led upon the point, and found them to be 27*s*. 1½*d*.," and he goes on to explain that in arriving at the 27*s*. 1½*d*. he had taken into account things which had happened after the accident, namely, the increase in the wages, and the fact that the man's age was sixty-four. In other words, he had fixed the rate of wages as at the date of the accident in the light of circumstances which happened after the accident, and there he was wrong, and therefore the First Division were quite right in going back to the 30*s*. which the parties had admitted was the actual wage before the accident. Now, if the learned judges had stopped there, I should have had no more to say, but unfortunately they seem to have lost sight of that fact in their judgment, and Lord Adam goes on to say as a general proposition that in all fixing of wages it is not relevant to take into account that since the date of the accident there had been a fall in the rate of wages. That proposition of course will not stand with the

(1) [1912] 1 K. B. 63. (2) 5 F. 958.

H. L. (E.) 1917

WOODILEE COAL AND COKE COMPANY v. M'NEILL.

decision in *Bevan* (1), and it is with the decision in *Bevan* (1) that I agree for the reasons I have already given.

LORD ATKINSON. My Lords, I entirely concur, and especially with some of the remarks which have fallen from my noble friend who has just preceded me.

It has been often laid down in this House that the Workmen's Compensation Act was designed to compensate workmen for the loss of the power to earn. Now, if you separate that question from the maxima-limiting provisions, nothing could be more appropriate where you have to ascertain the loss sustained by a man's being deprived of the power to earn than to consider the wages he could have earned had he not been incapacitated. Therefore it seems to me on the broad question, what is the loss which he has sustained by being deprived of the power to earn—what is the adequate compensation which should be awarded to him by reason of that deprivation? the amount of the wages which he could have earned had he been quite fit during the time the incapacity continues is a most appropriate and proper matter to take into account.

Then come in a number of provisions limiting the maximum and minimum, and of course, if they exclude the consideration of the higher wages the man might have earned, they must have their effect; but it would appear to me that where they do not exclude this consideration it is most right and proper that it should be taken into account. Now, I do not find in this statute anything excluding the consideration of a higher wage from the contemplation of the arbiter in fixing the sum within the statutory limit. Within the statutory limits he is, in my view, perfectly entitled to consider the higher wages, because that is the measure of the loss which the man sustains, presumably because of the incapacity to earn the higher wages. I do not think, therefore, that the arbiter in this case has taken into consideration anything which he ought not to have taken into consideration. He has confined himself within the statutory limits. He has taken the average wage at the time the accident occurred, he has taken the lower wages which the

(1) [1912] 1 K. B. 63.

man was earning at the time he made his claim, and he has only given the actual difference between these two sums.

LORD PARMOOR. My Lords, I concur. The question is one of fixing an amount of compensation within a certain defined statutory maximum. I do not think that the arbiter, in assessing the compensation, is limited to considering only the conditions which determine the fixing of the statutory maximum under the Act. Unless this restriction is imported, a rise or fall of wages appears to me to be a relevant factor of considerable importance in determining the amount of compensation payable to the workman. If it is relevant, then the amount is solely for the arbiter.

My Lords, I agree in the decision given in the case of *Bevan* v. *Energlyn Colliery Co.* (1) In my opinion the case of *James* v. *Ocean Coal Co.* (2) has no reference to this case. The error there was that the arbiter took into consideration fluctuating maxima, which is certainly incorrect under the terms of the Act.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, October 16, 1917.

Agents for appellants: *Beveridge & Co., for W. T. Craig, Writer, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for respondent: *C. F. Martelli, for Cormack & Roxburgh, Solicitors, Dumbarton, and Weir & Macgregor, S.S.C., Edinburgh.*

(1) [1912] 1 K. B. 63. (2) [1904] 2 K. B. 213.

[HOUSE OF LORDS.]

H. L. (E.)* 1917 *Oct.* 29.

HEATHCOTE . . . . . Appellant;

AND

HAUNCHWOOD COLLIERIES, LIMITED) . Respondents.

Workmen's Compensation—Partial Incapacity—Principle of Assessment —Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 3.

For the purpose of assessing compensation under the Workmen's Compensation Act, 1906, in a case of partial incapacity, where the injured workman is actually employed in some suitable employment, prima facie the amount which he earns in that employment is the measure of what he is able to earn.

A workman, who was partially incapacitated by accident and applied for compensation, before the accident was earning 35*s.* a week at the coal face and at the time of the arbitration was earning 30*s.* a week as a carter. The county court judge found that but for the accident the workman at the time of the arbitration could have earned 8*s.* 6*d.* a day at the coal face, but that he was not fit for that employment, and that he could earn 7*s.* 5*d.* a day as a packer or loader, which was a suitable employment, and he awarded him 5*s.* a week:—

Held, that, in the absence of any finding that the workman had the opportunity of obtaining employment as a packer or loader, the county court judge was entitled to award him the difference between the 35*s.* he was earning before the accident and the 30*s.* he was earning in his present employment, and that there was no ground for disturbing the award.

Observations on the duty of the arbitrator to state explicitly his findings of fact.

Decision of the Court of Appeal [1917] 1 K. B. 450 reversed.

Appeal from an order of the Court of Appeal varying an award of the county court judge of Nuneaton under the Workmen's Compensation Act, 1906.

On September 2, 1915, the appellant, who was then in the employment of the respondents, was working at the coal face when a piece of coal or stone struck his left eye, as a result of which the eye had to be removed. On May 19, 1916, he filed an application

* *Present:* Lord Finlay L.C., Lord Dunedin, Lord Atkinson, and Lord Parmoor.

for arbitration under the Act. The respondents opposed the application on the ground that the appellant was no longer incapacitated from earning the same wages as before the accident. At the time of the accident the average weekly earnings of the appellant were 35*s*. At the time of the arbitration the appellant was employed as a carter by the Nuneaton Corporation at 5*s*. a day.

The county court judge found that at the time of the arbitration the appellant was partly incapacitated and could not be suitably employed on his old work at the coal face, but that he was able to work at loading or packing, which was a suitable employment for him; that but for the injury the appellant could work at the coal face and could earn 8*s*. 6*d*. a day, and that he could now earn as a packer or loader 7*s*. 5*d*. a day; and taking into consideration all the circumstances, including the amount which the appellant would then be able to earn if there had been no accident, he awarded him 5*s*. a week.

The Court of Appeal by a majority (Lord Cozens-Hardy M.R. and Scrutton L.J., Warrington L.J. dissenting) varied the award by reducing the weekly payment to 1*d*., upon the ground that the appellant was at the time of the arbitration able to earn as a loader or packer more than his earnings before the accident.

Rigby Swift, K.C., and *H. H. Joy*, for the appellant. There was no evidence upon which the county court judge could find—nor did he in fact find—that the appellant had the opportunity of earning as much as he was earning before the accident. As the appellant was actually earning wages in a suitable employment which it was not improper or unreasonable for him to have entered into, it was not necessary for the county court judge to inquire what he might have earned in some other employment. It was competent for the county court judge to adopt the actual wage being earned by the appellant and to award the difference between that wage and the pre-accident wage. This case is covered by *Woodilee Coal and Coke Co.* v. *M'Neill*. (1)

Holman Gregory, K.C., and *Alexander Neilson*, for the respondents. The county court judge having found as a fact that the appellant could have earned more after than before the accident, he had no

(1) Ante, p. 43.

H. L. (E.) 1917 HEATHCOTE v. HAUNCH-WOOD COLLIERIES.

power to award him compensation. The findings of the county court judge show that he must have proceeded upon some wrong basis, and it is suggested that he based his award upon the difference between the amount which, but for the accident, the workman could have earned at the coal face and the amount which he could earn as a packer or loader.

LORD FINLAY L.C. My Lords, it has been more than once pointed out in this House that it is proper that there should in every one of these cases be an explicit statement of what the findings of the arbitrator are, so that the House may be in a position to deal with the case and to eliminate the proposition of law, if any, on which the arbitrator is said to have gone wrong. In the present case the greater part of the argument has been devoted to speculations as to what the county court judge meant. The whole of that might have been made perfectly clear in two sentences. However, we must deal with the case as we have got it, and the way I look at it is this. The county court judge has awarded 5*s.*, and, taken on the face of it, there is nothing absurd or unreasonable about that amount. It is for those who impugn the award as being erroneous in point of law to show that it has proceeded upon a wrong basis. Now it seems to me that the respondents have failed to show that the award proceeded on a basis which was erroneous in point of law. Mr. Holman Gregory says that what the county court judge did was this: he took the amount which the man would have been able to earn at the face if he had not been injured by losing one eye, and then took the difference between that amount and what he could earn as a packer or loader at 7*s.* 5*d.* a day. That is mere speculation. The amounts do not fit, and there is nothing to explain why 5*s.* was arrived at on that basis; and I do not think it is established that that is the basis that the county court judge proceeded upon. If he did, of course he was hopelessly in error; but the result would not be the result which was arrived at in the Court of Appeal, that it should be held that the workman was entitled to nothing, and that there should be a merely nominal amount to keep the thing open in case circumstances changed; the result would be, at the outside, that the case would have to be sent back to arrive at the proper amount on the true basis.

It appears to me that the view which the majority of the Court of Appeal took was erroneous. They were dealing with the latter portion of par. 3 of the First Schedule to the Workmen's Compensation Act of 1906. The words there are these: "and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." "Is earning or is able to earn," the second branch, covers two cases—first, that the man is not taking any work at all, and therefore earning nothing, and, secondly, the case where he is taking work which yields less wages than he might have got if he chose to look out for other work and took that. You must deal with the question of what work he might get with reasonable diligence. The workman here is earning 30*s.* a week as a driver. Though he is capable of working as a packer who would earn 7*s.* 5*d.* a day, there is no finding that such work was available for him or that he acted otherwise than reasonably in taking a situation as driver at 30*s.* a week. Under these circumstances he was entitled to 5*s.* a week, the difference between the 35*s.* he was earning before the accident and the 30*s.* he is earning now. It is this amount that the county court judge has awarded, and the award cannot be disturbed on the surmise that the reasons for the award were wrong.

With regard to the words at the close of the paragraph to which I have been referring, that the award "shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper," it was decided the other day by this House that under these words it is perfectly legitimate for the arbitrator to take into account, as an element in arriving at whether he should give the maximum or not, what the man would have been able to earn if the accident had not taken place.

Under these circumstances, my Lords, it appears to me that the respondents, those who quarrel with this award, fail to show altogether that the arbitrator has gone wrong in point of law; the utmost that they could contend for would be that the thing

H. L. (E.) 1917

HEATHCOTE v. HAUNCH-WOOD COLLIERIES.

is left in so much doubt and darkness that it ought to be remitted; but it is not on that basis that the case has come before your Lordships: no application of that kind is made to your Lordships, and it appears to me that under these circumstances there is no alternative before your Lordships but to allow the appeal.

LORD DUNEDIN. My Lords, in the case of *Woodilee Coal Co.* v. *M'Neill* (1) about a fortnight ago I made certain observations to your Lordships upon what I thought the true construction of that portion of the schedule which has been under consideration in this case, and I therefore do not repeat myself upon the general question.

There is one point which was not touched in that case, and which in one sense arises for consideration in this, and that is upon the words "is earning or is able to earn." I have no doubt that although prima facie what a man is de facto earning must be taken into consideration first, yet it would be perfectly possible for those who objected to that figure being taken to urge and show that the amount he was earning was not really what he might earn if he took proper steps to get the most remunerative employment he could find. I have not a doubt that that inquiry would be perfectly competent; but I think it is in accordance with common sense that if you find a man actually at work you would always begin at least with the consideration of the figure which he was actually earning.

Coming now to the findings in the present case, I entirely agree with what the noble and learned Lord on the woolsack has said that this award is very badly framed. An arbitrator who knows that his award may go further has no business to talk in shorthand, as this arbitrator has done, and I quite see that it is possible to impute the meaning to the words which Mr. Holman Gregory imputed. But I find myself, under the circumstances of the case, bound to take my choice between two courses. Either I must hold that the meaning of the words which the arbitrator has used shows that he was very clearly wrong in law, and also shows that he pronounced a finding for which there was no basis, or at

(1) Ante, p. 43.

least a most slender basis, in the evidence, or I must find that the meaning of his words is otherwise, and that then his law is all right, and that then his finding is one such as if I were myself an arbitrator I could well support upon the facts which were proved before this arbitrator.

My Lords, in these circumstances it seems to me very clear which of the two courses I should take, and accordingly I entirely agree with the course which my noble and learned friend on the woolsack proposes.

LORD ATKINSON. My Lords, I concur. On the face of this award the arbitrator has taken the entire of the difference between the wages which the workman was earning at the time he met with the accident and the wages he was earning at the time of his claim. Prima facie that is right. He has not transgressed the law in any way in doing it. It was perfectly competent for him to have given the maximum between those two extremes. He has done that, and what one is asked to do is to try and spell out from his award something which shows that he was wrong in law in arriving at that right conclusion, or at all events perfectly defensible conclusion. It does not seem to me that that is satisfactorily made out upon the face of the award.

My Lords, I think as to par. 3 itself that it is perfectly obvious, if one takes the whole object of these Acts and rules into consideration, that the object to be effected by the words "which he is earning or is able to earn in some suitable employment" was to prevent an employer being mulcted by an injured workman either refusing to work at all, or deliberately taking a wage less than he could have got; and it certainly appears to me that once you have a man in employment earning a wage it is for those who allege that that is not bona fide—that he is taking less than he could get and thereby imposing a greater burden upon his employer—to prove it. I do not think there is anything of that kind here, and I think no effort was made (and certainly if made it did not succeed) towards proving that the man had done anything whatever unreasonable in going into work for which he would receive 30*s.* a week. I do not think the words of the finding that he can do this work mean more than that he is physically

H. L. (E.) 1917

HEATHCOTE v. HAUNCH-WOOD COLLIERIES.

fit to do the work if he got the chance, but it is not a finding that he has got the chance or could get the chance.

My Lords, I think the result arrived at by the learned Lords Justices in this case was erroneous and should be reversed.

LORD PARMOOR. My Lords, I concur, and I do not desire to say anything more on the question of the finding of the arbitrator than what has already been expressed to your Lordships. I think what the Court of Appeal really determined was, as a matter of law and construction, the meaning of the words "which he is earning or is able to earn." The question is not only whether the man is earning anything, but whether he is earning anything under reasonably suitable conditions. I think it is essential to read in the words that we find in the judgment of Warrington L.J.: "Now here we have a case in which a man is earning a weekly amount, and there is no suggestion that he has acted unreasonably in accepting that weekly amount." Where an amount is being earned in fact and there is no suggestion that the man has acted unreasonably in accepting that weekly amount, it is perfectly competent for the arbitrator, as a matter of fact, to deal with that as an ascertained figure in fixing the amount of his award.

My Lords, on that ground I agree that the appellant succeeds.

Order of the Court of Appeal reversed and award of the county court judge restored. The respondents to pay the costs in the Court of Appeal and also the costs of the appeal to this House.

Lords' Journals, October 29, 1917.

Solicitors for appellant: *Sharpe, Pritchard & Co., for Hughes & Masser, Coventry.*

Solicitors for respondents: *Wood, Nash, Hewett & Riddett, for Clay, Atkins & Cocks, Nuneaton.*

[HOUSE OF LORDS.]

MACKEY . . . . . APPELLANT; H. L. (I.)*

AND

1917

JAMES HENRY MONKS (PRESTON), LIMITED . . . . . RESPONDENTS. *Oct.* 29.

Ship—Factory—Dangerous Process—Loading or unloading Ship in Dock—Means of Access between Ship and Shore—Regulations of Secretary of State imposing Duties on Owner of Ship—Ultra Vires—Fatal Accident—Breach of Statutory Duty—Appeal—Competency—Maintenance—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 79, 84, 85, 104.

By s. 79 of the Factory and Workshop Act, 1901, where the Secretary of State is satisfied that any process used in factories or workshops is dangerous or injurious to health, he may certify that process to be dangerous and may thereupon, subject to the provisions of the Act, make "such regulations as appear to him to be reasonably practicable and to meet the necessity of the case," and by s. 104 the provisions of the Act with respect to regulations for dangerous trades were applied to the processes of loading and unloading any ship in dock.

By regulations made by the Home Secretary in 1904 under s. 79, after reciting that the processes of loading and unloading any ship in dock had been certified to be dangerous, it was provided that the means of access between the ship and the shore for the use of the persons employed should (subject to certain qualifications) be a gangway of the kind therein described, and that it should be the duty of the owner, master, or officer in charge of the ship to provide the prescribed means of access:—

Held by Lord Finlay L.C., Lord Atkinson, and Lord Parker of Waddington (Lord Parmoor and Lord Wrenbury dissenting), that the regulations, in so far as they imposed upon the owner of the ship the duty of providing a safe means of access, were not inconsistent with the provisions of the Act and were intra vires.

Where, therefore, a dock labourer, who was employed by a stevedore in unloading a ship in dock, fell off a ladder, which was the only means of access in use between the ship and the wharf, and was drowned, and his father brought an action for damages against the owner of the ship under the Fatal Accidents Acts for

---

* *Present:* Lord Finlay L.C., Lord Atkinson, Lord Parker of Waddington, Lord Parmoor, and Lord Wrenbury.

H. L. (I.)
1917
MACKEY
v.
JAMES HENRY MONKS (PRESTON).

breach of statutory duty in not providing a safe means of access and obtained a verdict in his favour:—

Held (by the same majority), that he was entitled to judgment.

Per Lord Atkinson and Lord Parker of Waddington: A preliminary objection to the competency of the appeal based on the fact that the Crown had provided the appellant (the plaintiff) with the means of prosecuting his appeal, in order to get the question of the validity of the regulations finally settled, is untenable.

Decision of the Court of Appeal in Ireland [1916] 2 I. R. 200 reversed.

APPEAL from an order of the Court of Appeal in Ireland affirming an order of the King's Bench Division. (1)

The substantial question raised by the appeal was whether certain regulations made by the then Home Secretary, dated October 24, 1904, and purporting to have been made and issued under the powers of the Factory and Workshop Act, 1901, were ultra vires, in so far as they imposed upon the owner, master, or officer in charge of a ship lying at a wharf for the purpose of unloading a duty to provide a safe gangway, as therein described, from the ship to the shore for the use of the persons employed.

The action was brought under the Fatal Accidents Acts, 1846 and 1864, by the appellant, as the sole parent of one John Mackey, deceased, to recover damages alleged to have been sustained by him through negligence and breach of statutory duty on the part of the respondents, the owners of the steamship *Aletta*, which was being unloaded at a wharf in Waterford, in not providing proper means of access between the ship and the wharf, in consequence of which the deceased was drowned at Waterford on March 27, 1914.

The facts are fully stated in the judgment of the Lord Chancellor, which sets out the regulations of the Home Secretary and the material provisions of the Factory and Workshop Act, 1901, and they are sufficiently summarized in the head-note for the purposes of the argument.

At the trial of the action before Madden J. and a special jury the jury returned a verdict for the appellant for 270*l*.

The learned judge refused to give judgment, leaving the parties to move for judgment as they should be advised. Both parties

(1) [1916] 2 I. R. 200.

moved the King's Bench Division for judgment. The Court by a majority (Gibson J. and Palles C.B., Cherry L.C.J. dissenting) directed judgment to be entered for the respondents, on the ground that the regulations of the Home Secretary were ultra vires the power conferred on him by s. 79 of the Factory and Workshop Act, 1901, and this decision was unanimously affirmed by the Court of Appeal (O'Brien L.C., Ronan L.J., and Molony L.J.).

The Treasury Solicitor in Ireland made an offer to the appellant to undertake the presentation of this appeal to the House, and this undertaking was accepted by the appellant. The respondents presented a cross-appeal against the competency of the original appeal upon the ground that the appeal was not the appeal of the appellant, but was in truth the appeal of the Crown in order to obtain, in a litigation to which the Crown was not a party, a final decision upon the validity of the regulations in question, and that in the circumstances the appeal was unjust to the respondents and was maintenance and an abuse of the prerogative of the Crown.

1917. July 3, 5, 6, 9, 10. *Battersby, K.C.* (with him *W. Gibson, K.C.*, and *E. A. Swayne*) (all of the Irish Bar), for the respondents, argued the preliminary objection to the competency of the appeal. This is not the appeal of the appellant, but of the Crown, which has no interest in the litigation. The Crown is maintaining a pauper.

[LORD FINLAY L.C. said that their Lordships were of opinion that the appeal should proceed, this point being reserved.]

A. J. Walter, K.C., and *D. J. O'Brien, K.C.* (with them *M'Grath*) (the two latter of the Irish Bar), for the appellant. The power conferred on the Secretary of State by s. 79 of the Factory and Workshop Act, 1901, to make regulations must necessarily include power to say who are the persons to obey them. Sect. 79 contains no limitation, such as was to be found in the previous Factory Acts, as regards the persons whom the regulations are to affect, and this is intentional. But it is sought by a reference to other provisions of the Act to limit the power of the Secretary of State in this respect, and it is said that the only person to be affected is the occupier of a factory, and the Courts in Ireland have so held. But an examination of the material sections of the Act shows that this is an impossible contention. Sect. 80 shows that s. 79 was not intended to

H. L. (I.) 1917

MACKEY v. JAMES HENRY MONKS (PRESTON).

be limited to occupiers; the language is "persons affected," it being left to the Secretary of State to determine who are the persons reasonably concerned. Sect. 85 contemplates that the Secretary of State, in making regulations under s. 79, must have power to impose duties on persons who are neither occupiers nor owners of a factory. Several provisions in other parts of the Act were relied on in the Courts below by the respondents, but so far as they have any relevancy they are not inconsistent with the appellant's contention. The power of the Secretary of State is governed by the language of s. 79, and he may impose regulations upon any person so far as the necessity of the case appears to him to require. That, however, is subject to the power of Parliament to annul the regulations (s. 84). The Act contains no express provision giving the regulations statutory force, but the implied effect of s. 84 is that if the regulations are not annulled they are valid and binding. The regulation the breach of which is complained of is that "it shall be the duty of the owner, master, or officer in charge of a ship" to comply with Part II. of the regulations, which includes the regulation in regard to providing a safe means of access between the ship and the shore. The words defining the persons to be liable should be read as "owner and master or officer in charge"; all are liable. This point, however, is important only in considering the question of liability to the statutory penalties; it is sufficient for the purposes of this appeal that in a question of civil liability the duty is cast upon the master, because in a civil action the owner would be liable for the failure of his servant, the master, to fulfil a statutory duty. The fault complained of here is that in the process of unloading, which had been certified to be dangerous, no proper gangway was in use until after the accident. Under s. 104, sub-s. 2, coupled with s. 23, sub-s. 1, of the Act of 1895, which is still in force, a gangway in use by any person employed to load or unload a ship is a factory and the user of it is a manufacturing process. Once a gangway was put up between the ship and the wharf the shipowner became the owner of a factory and the stevedore the occupier. There is a liability on the stevedore as well as on the owner, but in each case the liability is in connection only with the unloading of the ship. Further, where a shipowner comes within the sphere of factory operations he must be a person capable of being bound by these regulations, and he is

affected, not as owner or occupier, but by the concluding words of s. 79. The cases referred to in the Courts below—*Raine* v. *Jobson & Co.* (1); *Houlder Line* v. *Griffin* (2); *Bartell* v. *W. Gray & Co.* (3); *Smith* v. *Standard Steam Fishing Co.* (4); *Merrill* v. *Wilson, Sons & Co.* (5); *Carrington* v. *Bannister & Co.* (6)—have no bearing on the question at issue.

Battersby, K.C., and *W. Gibson, K.C.* (with them *E. A. Swayne*), for the respondents. As regards the preliminary objection, the respondents admit that there is no precedent for staying an action on an allegation of maintenance.

[*A. J. Walter, K.C.* The circumstance that the plaintiff is being maintained is no defence to the action: *Skelton* v. *Baxter* (7); *Elborough* v. *Ayres.* (8)]

It is open to this House to decide that it will not continue an action in the name of a plaintiff who is being maintained. Upon the authorities the Crown has no interest in this action. But for the intervention of the Crown there would have been no appeal to this House, and for reasons of justice alone this appeal should be stayed.

As to the merits: 1. There was no evidence to support the verdict of the jury. There was no evidence that the deceased man fell off the ladder. The evidence is equally consistent with his falling off the wharf, the ladder, or the ship, and therefore the plaintiff's case fails: *Singleton* v. *Eastern Counties Ry. Co.* (9); *Wakelin* v. *London and South Western Ry. Co.* (10); *Marshall* v. *Owners of S.S. Wild Rose* (11); *Kitchenham* v. *Owners of S.S. Johannesburg.* (12)

2. The regulation is ultra vires. Under s. 79 regulations may be imposed only on those persons who are covered by the Act itself. It has never been contended that the power of the Secretary of State is absolutely confined to imposing regulations on occupiers; but, looking at the Act as a whole, the owner is made liable only

(1) [1901] A. C. 404.
(2) [1905] A. C. 220.
(3) [1902] 1 K. B. 225.
(4) [1906] 2 K. B. 275.
(5) [1901] 1 K. B. 35.
(6) [1901] 1 K. B. 20.
(7) [1916] 1 K. B. 321, 326.
(8) (1870) L. R. 10 Eq. 367, 373.
(9) (1859) 7 C. B. (N.S.) 287.
(10) (1886) 12 App. Cas. 41.
(11) [1910] A. C. 486, 491.
(12) [1911] 1 K. B. 523; [1911] A. C. 417.

H. L. (I.) 1917 — MACKEY v. JAMES HENRY MONKS (PRESTON).

in exceptional cases, e.g., cases involving structural alterations of the fabric, where he is put in the place of the occupier. The basis of the Act is the responsibility of the occupier to the employee for accidents which may happen to him in his employment. The owner of a ship is not either the owner or the occupier of a factory within the Act. A ship is not a factory and there is no power in the Secretary of State to apply these regulations to ships at all. The assumption of this power may have been due to a mistake in the head-note of *Bartell* v. *W. Gray & Co.* (1), which is treated as a decision that a ship was a factory within the Act: see *Harrison* v. *Oceanic Steam Navigation Co.* (2) The shipowner here is a mere stranger; he has nothing to do with the unloading; it is the consignee and the stevedore alone who are concerned; and the Act itself puts no obligation on any outsider. Sect. 104 supports the respondents' contention: *Handford* v. *George Clark & Co.* (3); and see *Stuart* v. *Nixon & Bruce* (4); *Carrington & Co.* v. *Bannister* (5); *Merrill* v. *Wilson, Sons & Co.* (6), which are decisions on the corresponding section of the Act of 1895. By s. 104 the gangway is made a notional factory only when in use, as distinguished from a solid structure such as a wharf, which is a factory per se, and the occupier or user of the plant or machinery is the person to be liable for a breach of the regulations. The whole purview of the Act suggests that the liability must be so limited: see *Marney* v. *Scott.* (7) The contention that the Secretary of State may put the liability on an outsider, who is not using and cannot control the process, necessarily involves abrogating by implication several provisions of the Act—s. 19, sub-s. 4; s. 21; s. 104, sub-s. 1, cl. v.; s. 136.

[The respondents' counsel ultimately abandoned the preliminary objection.]

A. J. Walter, K.C., in reply. Sect. 104 is a definition section, and does not limit the power conferred by s. 79 as to the persons to be affected by the regulations. The shipowner is not a stranger to the processes of loading and unloading, which are carried on for his benefit as well as for the benefit of the shipper or the consignee.

(1) [1902] 1 K. B. 225.
(2) [1907] 2 K. B. 420, n.
(3) [1907] 2 K. B. 409, 418.
(4) [1901] A. C. 79, 89.
(5) [1901] 1 K. B. 20.
(6) [1901] 1 K. B. 35, 39.
(7) [1899] 1 Q. B. 986, 992–3.

This Act must be construed so as to give effect, as far as possible consistently with its terms, to the protection accorded to persons employed in dangerous work: *Butler* v. *Fife Coal Co.* (1)

The House took time for consideration.

Oct. 29. LORD FINLAY L.C. My Lords, the action in this case was brought under the Fatal Accidents Acts by the father of John Mackey to recover damages for his death alleged to have been caused by the neglect of the defendant company, the owners of the steamship *Aletta*, to provide proper means of access to the vessel, in accordance with the regulations of October 24, 1904, made by the Home Secretary in respect of loading and unloading vessels.

The question raised on the appeal is whether these regulations are ultra vires.

The statement of claim alleged that, in pursuance of the Factory and Workshop Act, 1901, and of the regulations, a gangway ought to have been provided by the defendants as a means of access by persons employed in unloading the defendants' ship, but that on the night of March 27, 1914, the only means of access was by a narrow and frail ladder, unfenced, and not properly secured or made fast. The statement of claim went on to allege that when employed on the unloading of the defendants' ship the deceased John Mackey, the son of the plaintiff, in consequence of the defendants' negligence and breach of statutory duty, fell into the sea and was drowned. The defendants by their statement of defence denied the existence of the duty alleged.

The case was tried before Madden J. and a special jury at Waterford on March 4 and 5, 1915. It appeared at the trial that the *Aletta* at the time of the accident was being unloaded at a quay on the river at Waterford. The defendants, as owners of the *Aletta*, had provided a proper gangway, in accordance with the regulations, and this gangway was on board the ship, but the master and crew had failed to put it up for use during the unloading, and substituted a ladder as a means of access between the quay and the ship. This ladder was at the time of the accident in a horizontal position between the quay and the ship, owing to the state of the tide, and

(1) [1912] A. C. 149, 178.

H. L. (I.) 1917 — MACKEY v. JAMES HENRY MONKS (PRESTON). — Lord Finlay L.C.

the passage along it was consequently dangerous. The deceased and his fellow-workmen were in the employment of the stevedore employed by the consignee to effect the unloading. At about 10 P.M. they left the ship for half an hour to get some refreshment, and on their return they proceeded to cross the ladder on their hands and knees. The deceased was the last of the party, and fell from the ladder into the water and was drowned. The learned judge put to the jury specific questions which, with the answers, are as follows: "1. Was it reasonably practicable to employ a gangway as a means of access from the shore to the ship?—Yes. 2. Was the ladder employed secure and reasonably safe for the purpose?—No. 3. Was it at the time of the occurrence so placed as to be a safe means of access?—No. 4. Was the death of Mackey the result of a fall from the ladder?—Yes. 5. Was the proximate and direct cause of the death of Mackey the non-user of a gangway within the statutory requirements?—Yes. 6. Was the proximate and direct cause of the occurrence the neglect of the defendants to provide a reasonably secure and safe means of access to the ship?—Yes. 7. Did the defendants provide a gangway suitable to be employed by those in charge of the vessel?—Yes." And the jury assessed the plaintiff's damages for the loss of his son at 270*l.*

The learned judge left the parties to move for judgment. Motion was made accordingly in the King's Bench Division, and after prolonged argument before the Lord Chief Justice, the Lord Chief Baron, and Gibson J. the Court (the Lord Chief Justice dissenting) set aside the verdict for the plaintiff and entered judgment for the defendants on the grounds that the regulations relied on by the plaintiff were ultra vires, and that there was no such statutory or common law duty as alleged by the plaintiff.

On appeal the Court of Appeal affirmed the decision of the King's Bench Division, and from their judgment the present appeal was brought by the plaintiff to your Lordships' House.

It was contended on behalf of the appellant that the regulations of the Home Secretary were intra vires, and that on the findings of the jury the plaintiff was entitled to judgment on the ground that the defendants were liable for the failure of their servants in control of the ship to put up the gangway for use during the unloading.

The appellant also contended that, even if the regulations were ultra vires, the shipowners would be liable on the ground of negligence at common law, apart from the statutory regulations; but this contention was not very seriously pressed, and is in my opinion quite unsustainable.

The respondents contended that there was no evidence that the deceased had met with his death owing to the defective means of access to the ship; but in my opinion this contention cannot be supported. There was, it appears to me, ample evidence, and the question was one for the jury. The case, therefore, reduces itself to the question whether the regulations impeached are valid.

The regulations of October 24, 1904, begin with the following recital: "Whereas the processes of loading, unloading, moving and handling goods in, on, or at any dock, wharf, or quay, and the processes of loading, unloading and coaling any ship in any dock, harbour, or canal have been certified in pursuance of section 79 of the Factory and Workshop Act, 1901, to be dangerous:—"; and go on to say that the Secretary of State, in pursuance of the powers conferred on him by that Act, made the following regulations for the protection of persons employed in the processes or any of them.

The regulations are divided into six parts. Part I. relates to the fencing of docks, wharves, and quays, to the supply of life-saving appliances to be kept in readiness on the wharf and quay, and to efficient lighting. Part II. relates to the loading and unloading of vessels, and is that on which the present case depends. Part III. makes provision for the safety of machinery. Part IV. makes provision for the manner in which loading and unloading are to be carried out. Part V. prohibits interference by any person with fencing, gangways, and other things required by the regulations to be provided. Part VI. prescribes that no employer shall allow machinery or gear to be used which does not comply with the regulations, and provides that, if the person required to comply with certain of the regulations contained in Part II. fails so to do, it should also be the duty of the employers of the persons employed for whose use the means of access and the lights are required to comply with the said regulation.

H. L. (I.) 1917

MACKEY v. JAMES HENRY MONKS (PRESTON).

Lord Finlay L.C.

Under the head " Duties " it is provided as follows :—

" It shall be the duty of the owner, master, or officer in charge of a ship to comply with Part II. of these regulations.

" It shall be the duty of the owner of machinery or plant used in the processes, and in the case of machinery or plant carried on board a ship not being a ship registered in the United Kingdom it shall also be the duty of the master of such ship, to comply with Part III. of these regulations.

" It shall be the duty of every person who by himself, his agents, or workmen carries on the processes, and of all agents, workmen, and persons employed by him in the processes, to comply with Part IV. of these regulations."

The most material portions of Part II. are the following :—

" 4. If a ship is lying at a wharf or quay for the purpose of loading or unloading or coaling there shall be means of access for the use of persons employed at such times as they have to pass from the ship to the shore or from the shore to the ship as follows :—

" (*a*) Where a gangway is reasonably practicable a gangway not less than 22 inches wide, properly secured, and fenced throughout on each side to a clear height of two feet nine inches by means of upper and lower rails, taut ropes or chains, or by other equally safe means.

" (*b*) In other cases a secure ladder of adequate length.

" Provided that nothing in this regulation shall be held to apply to cargo stages or cargo gangways, if other proper means of access is provided in conformity with these regulations.

" Provided that as regards any sailing vessel not exceeding 250 tons nett registered tonnage and any steam vessel not exceeding 150 tons gross registered tonnage this regulation shall not apply if and while the conditions are such that it is possible without undue risk to pass to and from the ship without the aid of any special appliances.

" 5. If a ship is alongside any other ship, vessel, or boat, and persons employed have to pass from one to the other, safe means of access shall be provided for their use, unless the conditions are such that it is possible to pass from one to the other without undue risk without the aid of any special appliance.

" If one of such ships, vessels, or boats is a sailing barge, flat,

keel, lighter or other similar vessel of relatively low freeboard the means of access shall be provided by the ship which has the higher freeboard.

" 6. If the depth from the top of the coamings to the bottom of the hold exceeds six feet there shall be maintained safe means of access by ladder or steps from the deck to the hold in which work is being carried on, with secure hand-hold and foot-hold continued to the top of the coamings.

" In particular such access shall not be deemed to be safe :—

" (*a*) Unless the ladders between the lower decks are in the same line as the ladder from the main deck, if the same is practicable having regard to the position of the lower hatchway or hatchways.

" (*b*) Unless the cargo is stowed sufficiently far from the ladder to leave at each rung of the ladder sufficient room for a man's feet.

" (*c*) If there is not room to pass between a winch and the coamings at the place where the ladder leaves the deck.

" (*d*) If the ladder is recessed under the deck more than is reasonably necessary to keep the ladder clear of the hatchway."

The duty of providing proper means of access for the men employed in loading or unloading is, therefore, by these regulations thrown upon " the owner, master, or officer in charge of a ship." The clause imposing this duty is not very grammatically worded. It should probably run : " The owner *and* master or officer in charge of a ship." It must, in my opinion, be read as throwing the duty upon the owner, and also, where the matter in question relates to what would naturally be done by those in charge of the ship, upon the master or officer in charge. The owner alone would be liable for supplying the articles required to be provided, but the master and officer in charge would also be liable for their being put up and provided so as to be available for the men employed on the loading or unloading. In case of default by the master or officer in charge and consequent injury to a workman, the owner of a ship, assuming the validity of the regulations, would be liable in an action at the suit of the workman, on the principle that the employer is liable to those injured by the default of his servants, and also on the ground that the duty is thrown on the owner, not only of supplying, but also

H. L. (I.) 1917

MACKEY v. JAMES HENRY MONKS (PRESTON).

Lord Finlay L.C.

of providing for use, the necessary means of access, and that he cannot relieve himself from any part of his duty by delegating it to others.

The question to be decided is whether these regulations are warranted by the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22).

The regulations are said to have been made under the provisions of ss. 79 to 86, headed " Regulations for Dangerous Trades," with which must be read s. 104.

Sect. 79 is in the following terms :—

" Where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour, used in factories or workshops, is dangerous or injurious to health or dangerous to life or limb, either generally or in the case of women, children or any other class of persons, he may certify that manufacture, machinery, plant, process or description of manual labour to be dangerous ; and thereupon the Secretary of State may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case."

Sect. 80 provides for notice to persons affected by the proposal to make regulations and for the consideration of any objections, while s. 81 empowers the Secretary of State to have a public inquiry with regard to any draft regulations at which evidence may be taken on oath. In the case of these regulations now in question notice was given and objections were heard.

Sect. 82 is in the following terms :—

" (1.) The regulations made under the foregoing provisions of this Act may apply to all the factories and workshops in which the manufacture, machinery, plant, process or description of manual labour, certified to be dangerous, is used (whether existing at the time when the regulations are made or afterwards established) or to any specified class of such factories or workshops. They may provide for the exemption of any specified class of factories or workshops either absolutely or subject to conditions.

" (2.) The regulations may apply to tenement factories and tenement workshops and in such case may impose duties on occupiers who do not employ any person and on owners.

"(3.) No person shall be precluded by any agreement from doing, or be liable under any agreement to any penalty or forfeiture for doing, such acts as may be necessary in order to comply with the provisions of any regulation made under this Act."

The provisions of s. 83 are not material to the present purpose.

Sect. 84 runs as follows :—

"Regulations made under the foregoing provisions of this Act shall be laid as soon as possible before both Houses of Parliament and, if either House, within the next forty days after the regulations have been laid before that House, resolve that all or any of the regulations ought to be annulled, the regulations shall, after the date of the resolution, be of no effect, without prejudice to the validity of anything done in the meantime thereunder or to the making of any new regulations. If one or more of a set of regulations are annulled, the Secretary of State may, if he thinks fit withdraw the whole set."

It was contended for the appellant that as this s. 84 had been complied with, the fact that no resolution against the regulations had been carried was conclusive as to their validity. It seems, however, to me to be clear that this section has no such effect. It makes provision for the annulment of any regulations if either House so resolves, but contains no words which could have the effect of giving validity to a regulation which is beyond the statutory powers of the Secretary of State merely because Parliament has failed to exercise the power of procuring its annulment. The process of laying the regulation before both Houses of Parliament is an additional precaution, but it does not affect the question whether a particular regulation is ultra vires, which must be determined when it arises in accordance with law. Of course, Parliament might have enacted that after the regulations had lain on the table of both Houses of Parliament for the statutory period they should be good conclusively for all purposes, but there are no words in the section that can bear this meaning.

Sect. 85 is as follows :—

"(1.) If any occupier, owner or manager, who is bound to observe any regulation under this Act, acts in contravention of, or fails to comply with, the regulation, he shall be liable for each offence to a fine not exceeding ten pounds, and, in the case of a continuing offence,

H. L. (I.) 1917

MACKEY v. JAMES HENRY MONKS (PRESTON).

Lord Finlay L.C

to a fine not exceeding two pounds for every day during which the offence continues after conviction therefor.

"(2.) If any person other than an occupier, owner or manager, who is bound to observe any regulation under this Act, acts in contravention of, or fails to comply with, the regulation, he shall be liable for each offence to a fine not exceeding two pounds; and the occupier of the factory or workshop shall also be liable to a fine not exceeding ten pounds, unless he proves that he has taken all reasonable means by publishing, and to the best of his power enforcing, the regulations to prevent the contravention or non-compliance."

Sect. 86 provides for notice of all regulations, for the exhibition in factories of printed copies and for the supply by the occupier of a factory of printed copies to any person affected.

Sect. 104 is as follows:—

"(1.) The provisions of this Act with respect to—

"(i.) Power to make orders as to dangerous machines (section seventeen);

"(ii.) Accidents;

"(iii.) Regulations for dangerous trades;

"(iv.) Powers of inspectors (section one hundred and nineteen); and

"(v.) Fines in case of death or injury (section one hundred and thirty-six),

shall have effect as if every dock, wharf, quay and warehouse and all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour or canal were included in the word 'factory,' and the purpose for which the machinery or plant is used were a manufacturing process; and as if the person who by himself, his agents or workmen uses any such machinery or plant for the before-mentioned purpose were the occupier of the premises; and for the purpose of the enforcement of those provisions the person having the actual use or occupation of a dock, wharf, quay or warehouse or of any premises within the same or forming part thereof and the person so using any such machinery or plant shall be deemed to be the occupier of a factory.

"(2.) For the purposes of this section, the expression 'plant' includes any gangway or ladder used by any person employed to load

or unload or coal a ship, and the expressions 'ship' and 'harbour' have the same meaning as in the Merchant Shipping Act, 1894."

It was strenuously contended by the respondents that the regulations imposing on the owner of a ship the duty of providing means of access between the ship and the quay during loading or unloading are ultra vires, on the grounds—(1.) that the Secretary of State has under the Act power only to prescribe what processes should be followed, but not to say by whom any necessary machinery is to be provided; (2.) that we must look to the Act for the obligation imposed on owners and occupiers respectively, and that, in the words of Gibson J. at p. 13 of the record (letters D and E.), the Minister cannot by regulation transfer or shift the obligation imposed on the defined occupier and owner respectively; (3.) that by virtue of s. 104 the regulations can impose duties only on occupiers.

The propositions for which the respondents contended are set out by Gibson J. (1) in his summary of his reasons for rejecting the plaintiff's construction of s. 79. I may refer particularly to what he says under head 1 of this summary: "Section 79, as the other sections show, deals with processes and methods, but does not enable the incidence of the duty, whether placed by the statute on the occupier or owner, to be altered. Processes, especially in the case of movable machinery or plant, are within the exclusive control of the immediate occupier. Sections 82, 83 and 86 indicate that the occupier is the person subject to the regulations, save where otherwise stated . . . . The duty in respect of plant devolves, obviously, on the person actually engaged in the process."

The respondents further contended (as was held by Gibson J.) that the regulations of 1904 were framed on the mistaken assumption that a ship loading or unloading or coaling was per se a factory.

In support of these contentions a great many sections in the Factory Acts of 1878, 1891, 1895, and 1901 were cited to show that by these Acts the duty in respect of a factory was as a rule imposed upon the occupier, and that when it was, as in the case of structural alterations, to be discharged by the owner, this was stated in express terms.

This line of argument appears to me to overlook the consideration that the terms of s. 79 show that in the case of regulations under

(1) [1916] 2 I. R. 223.

H. L. (I.) 1917 MACKEY v. JAMES HENRY MONKS (PRESTON). Lord Finlay L.C.

that section it is for the Secretary of State to define by the regulations the duty and the person by whom the duty is to be discharged. The regulations are to be "subject to the provisions of the Act." They must not contain anything at variance with the terms of the Act, but they may make such provisions as the Secretary of State thinks expedient for the processes of loading and unloading, and this power is given to him precisely because the Act does not already contain such provisions.

It is obviously expedient, if not necessary, that regulations dealing with the case of loading and unloading ships should not merely provide for the use of a gangway, but should say by whom it is to be supplied. It is in itself highly reasonable that the owner of the ship should be selected as the person to have a gangway ready for such purposes and through his servants to have it properly put up for use. It was for the Secretary of State to decide as to the incidence of this duty, and I cannot see any ground for saying that what he did was ultra vires, or that in settling the terms of the regulations he ignored any of the provisions of the statute which were applicable.

Great reliance was placed by the respondents upon s. 104 of the statute of 1901, which applies the provisions of the Act as to (inter alia) regulations for dangerous trades (ss. 79 to 86) as if every wharf, &c., "and all machinery or plant used in the processes of loading or unloading or coaling any ship in any dock, harbour, or canal were included in the word 'factory,'" and as if the person who uses any such machinery or plant were the occupier of the premises; and provides that "for the purpose of the enforcement of those provisions the person having the use or occupation of . . . . a wharf . . . . and the person so using any such machinery or plant shall be deemed to be the occupier of a factory"; and by the second subsection "plant" is defined as including any gangway or ladder used by any person to load or unload or coal a ship.

It was argued that this section in effect provides that only the occupier (that is, in the present case, the stevedore) could be affected by such regulations as to the loading and unloading of ships. This section seems to me to have no such effect. It defines as being the occupier in such cases the person using the machinery or plant in the processes of loading or unloading, and any duties which either by the statute or by the regulations are thrown upon the occupier

would, therefore, fall to be discharged by him. But s. 104 does not impose any duty whatever. It does not affect any power which, under s. 79, the Secretary of State, in framing the regulations, had to impose duties upon any person. By that section the Secretary of State may, subject to the provisions of the Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

The loading or unloading of a ship is a process which concerns several parties—the owner of the ship, the stevedore, the consignee. It may, in the nature of things, be most practicable and best meet the necessity of the case that some plant required should be supplied by the owner of the ship. He is directly concerned in the processes of loading and unloading, although it is usually now carried out by the stevedore. It is in the interest of the shipowner as well as in the interest of the merchant that the ship is loaded or unloaded. In former days the operation was carried out by the crew of the vessel. It is now found more convenient that in most cases a stevedore should be employed ; but how can this circumstance justify the assertion that the shipowner is not concerned in the matter and that the regulations requiring him to provide proper means of access between the ship and the quay during loading or unloading are as unreasonable as if they had been made against any one de circumstantibus upon the quay ?

It is for the Secretary of State to decide upon the reasonableness, the practicability, and the necessity of the case. This regulation was made in 1904, and it does not appear that any difficulty has ever been experienced in its application.

The truth is that the Legislature has thrown upon the Secretary of State the duty of deciding, and his decision is binding as long as he acts upon the terms of the section. But it was further contended that the power to make regulations under s. 79 was a power only to regulate the processes of loading or unloading ; that it would include the power to say that proper means of access between the ships and the quay should be used, but not to say by whom such means of access should be provided, and that the only sanction would be that in the absence of proper means of access the work would have to be suspended.

Such a construction of s. 79 is too narrow. Why does not the

H. L. (I.) 1917 MACKEY v. JAMES HENRY MONKS (PRESTON). Lord Finlay L.C.

power to make regulations include the power to say that proper plant should be provided and to say who it is that is to provide it? Plant is necessary. Is the Secretary of State only able to say that the work is not to proceed in the absence of proper plant? Surely every consideration of convenience, and indeed of necessity, points to the conclusion that the regulations may go on to say that it is to be provided and by whom.

I can see no adequate reason for the assumption made by Gibson J. at p. 17, letter G, in the appendix, that the regulations were framed on the mistaken assumption that just as a wharf was always per se a factory, so a ship loading, unloading, or coaling in the place described was per se a factory, and therefore amenable to all factory regulations. The regulations affect the owner of the ship as such and not as the owner of a factory. It is the *tout ensemble* of the machinery and plant used in the processes of loading or unloading on each occasion which, under s. 104, is deemed to be included in the word "factory."

The Secretary of State has to provide for the supply of the necessary machinery and plant. The ship is concerned in the processes of loading and unloading, and the owner of the ship as such is affected, and it is because he is a person so affected that it is, in my opinion, competent for the Secretary of State to throw upon him the duty of providing the means of access. It would no doubt have been competent for the Secretary of State to say that the person actually effecting the unloading (that is in this case the stevedore) should provide the means of access. Whether it would have been better so to provide or to throw the duty upon the owner of the ship was a matter for the discretion of the Secretary of State. There are, I think, reasons for the course chosen by the Secretary of State, but it is not open to us to enter into the question of their weight; all I can say is that the attack upon the regulations as ultra vires seems to me to have failed.

There is no one person who is owner of the whole of the notional factory constituted in the case of loading or unloading by s. 104; part of it may belong to the wharfinger, part to the stevedore, and part to the owner of the ship. But the question here is as to the obligation to provide in the first instance before the work begins, and I cannot see how it could have been supposed by the Secretary of

State that his power to make such a regulation affecting the owner of the ship depends upon the view that the ship is a factory or the fact that when the notional factory had been set up the shipowner would, if he complied with the order, be the owner of a part of it. The right to make these regulations rests on a much broader and simpler ground, namely, that as owner of the ship he is concerned in the loading and unloading, and that, therefore, it is right and reasonable that he should be called on to provide a particular part of the plant. Sects. 80, 81, and 84 make ample provision against the issue of improvident regulations.

Sect. 85 was relied on by the respondents as not being applicable to a shipowner. But in my opinion the shipowner might be liable to a penalty under that section if he disobeyed these regulations. The first sub-section provides for the punishment of an occupier, owner, or manager who contravenes the regulations. I do not think the word "owner" here is necessarily confined to the owner of a factory. It seems to me that it may include the case of the owner of a ship who as such is required to provide plant for an operation in which he is interested. But if he could escape the first sub-section as not being an owner under it, the words in the second sub-section "any person other than an occupier, owner or manager" are wide enough to include him. It is quite true that the second sub-section would appear to have had in contemplation primarily the case of servants of the occupier, but the words are wide enough to include other persons.

For these reasons I think that the decisions of the Courts in Ireland are erroneous and should be reversed, and the appellant should have his costs here and below.

LORD ATKINSON. My Lords, I concur.

The two questions which ultimately arise for decision in this case are, first, Was there evidence to sustain the finding of the jury on the first of the seven questions submitted to them by the learned judge? The test, according to well-established authority, is, was there evidence before them such that they could, as reasonable men, find as they have found in answer to that question? In my opinion there was such evidence before them, and there is, therefore, no ground for disturbing their verdict. The second and much more

H. L. (I.) 1917

MACKEY v. JAMES HENRY MONKS (PRESTON).

Lord Atkinson.

difficult question is this, Are the regulations, dated October 24, 1904, purporting to have been made by the then Home Secretary under the 79th section of the Factory and Workshop Act of 1901, imposing on the respondents, as owners of their steamship *Aletta*, a statutory duty, for the breach of which the action out of which this appeal arises was admittedly brought, ultra vires? The deceased, in respect of whose death by drowning his father, the plaintiff, sued under the Fatal Accidents Acts, of 1846 and 1864, was one of the men in the employment of the stevedore who contracted with the consignees of the cargo of the ship to discharge her. The men so engaged, amongst whom was the deceased, came ashore about 10.30 P.M. to get some refreshment and were returning to their work about 11 o'clock. The only means of access to the ship from the quay then available was a ladder extending from the quay to the ship, not made fast at either end, and, owing to the state of the tide, then in a horizontal position, so that the men going to or coming from the ship had to crawl across on their hands and knees (an admittedly dangerous proceeding). It was proved in evidence that there were no lights on the ladder, or on the ship save in the hold. There were two gangways on board the ship. The master swore that they were too short for use on a vessel such as his when discharging, as his was, on both sides and thought it not safe or practicable to use them, but used the ladder instead. The jury have found that the defendants did provide a gangway suitable to be employed by those in charge. By the use of the word "provide" in this answer it is obviously meant that the defendants furnished, or equipped, their ship with a gangway of the kind described. They also found that the proximate and direct cause of the death of the deceased was the non-user of a gangway in accordance with statutory requirement. On the happening of the accident the ladder was removed to aid in the search for the body of the deceased, and thereupon the captain states he put up one of the gangways he had on board and made it as safe as he could. I did not understand it to be contended that, if the finding of the jury that the death of the deceased was the result of a fall from the ladder was sustainable, this finding as to the non-user of such a gangway as is described being the direct and proximate cause of the death of the deceased can be disturbed. The Act of 1901 is entitled "An Act to consoli-

date with amendments the Factory and Workshop Acts." The policy and provisions of those several statutes have been criticized in argument and the development of this legislation traced, but I do not think they afford much aid in deciding the second of the above-mentioned questions. The statute of 1901 repeals in whole or in part six of those preceding Acts and two Cotton Factory Acts, as well as the Railway Employment (Prevention of Accidents) Act, 1908. It is general in its aim and application. It is sub-divided into ten separate and distinct parts dealing with different subjects. These parts are again sub-divided into separate sub-heads or sub-divisions. Part IV. is headed "Dangerous and Unhealthy Industries." It is again sub-divided into two sub-divisions, the first, headed "Special Provisions," containing six sections, numbered from 73 to 78, both inclusive. These sections deal mainly with matters of health, and provide that all factories and workshops in which there shall occur any contravention of its requirements shall be deemed not to be kept in conformity with the Act. These requirements are such as could be best complied with by the person on the spot, the occupier of the factory or the workshop, and by the 135th section a penalty is, not unnaturally, imposed upon the occupier of any factory or workshop not kept in conformity with the Act. The second sub-division of Part IV., that with which this case is conversant, is headed "Regulations for Dangerous Trades." It contains a fasciculus of eight sections, 79 to 86, both inclusive. It differs from all the other sub-divisions of the statute in two most important respects. First it contains provisions for the making of regulations, and second it does not expressly or impliedly impose duties or obligations on any person or class with regard to the equipment, management or working of any factory or workshop, while, on the other hand, by s. 82, sub-s. 2, it expressly enacts that the regulations themselves may impose duties on both the occupiers of tenement factories and tenement workshops who do not employ any person, and also upon the owners of the same. Again, s. 85, dealing with breaches of the regulations, is based upon the assumption that occupiers, owners, managers, and others may be bound to observe these provisions. Who those other persons may be is not mentioned in the section; but s. 79 provides a mode of ascertaining them—namely, by enacting

H. L. (I.) 1917 MACKEY v. JAMES HENRY MONKS (PRESTON). Lord Atkinson.

that where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour is dangerous or injurious to health, or dangerous to life or limb, either generally or in the case of women, children, or any other class of persons, he may certify that manufacture, machinery, plant, or process to be dangerous, and thereupon he may, subject to the provisions of the Act, make such regulations as appear to him to be reasonably practicable to meet the necessities of the case. The phrase "subject to the provisions of the Act" means, I think, merely not inconsistent with the provisions of the Act. The Secretary of State is made the judge of whether the regulations are reasonably practicable, and also whether they meet the necessities of the case; but, though his discretion is thus unfettered, it is in its nature a semi-judicial discretion, and it cannot be assumed that he will abuse it. Moreover, ss. 80, 81, and 84 set up elaborate machinery designed to secure that the regulations shall only be made after due inquiry in which all parties interested are entitled to appear and make objections. Both Houses of Parliament have also an opportunity of annulling all or any of the regulations. The use of the word "owner" in s. 79, though an unsuitable definition is given of it in s. 159 of the statute, presents no real difficulty, because if in any case the person who is the real owner of a factory or workshop does not come within the definition, then the regulation can be made to apply to him under sub-s. 2 of s. 85, as a person, other than an occupier, owner, or manager.

The provisions, however, of this sub-section enabling the occupier to excuse himself by proving that he has taken all reasonable means by publishing, and to the best of his power enforcing, the regulations would seem to indicate that the sub-section was primarily designed to meet the case of persons who were under the control of the occupier, such as members of the staff. In many factories there might be many persons who were between them owners, yet none of whom would satisfy the definition. And in the notional "factories" and "workshops," with which s. 104 deals, there might be no owner who satisfied it. That is no reason, however, in my view, why such persons should not be reached by this sub-section. The words "non-compliance" and "contravention" themselves indicate the existence of positive obligations requiring something to be done,

and negative obligations requiring something to be abstained from.

The regulations are wide and far-reaching in their scope. They may apply to factories and workshops, whether in being at the time they are made or to come into existence thereafter, in which the manufacture, machinery, plant or process, or description of manual labour certified to be dangerous is intended to be in future carried on or used. They may thus anticipate events.

They may provide for the exemption of any specified class of factories or workshops. They may, as already pointed out, impose duties on occupiers and owners of tenement factories and tenement workshops, and no person is to be precluded by any agreement from doing, or being liable under any agreement to any penalty or forfeiture for doing, such acts as may be necessary to comply with these provisions. They may (s. 83), amongst other things, prohibit the employment of, or modify or limit the period of employment of, all persons or any class of persons in any manufacture, machinery, plant, or process certified to be dangerous, or prohibit, limit, or control the use of any material or process, and modify or extend any special regulations for any class of factories or workshops contained in the Act.

Thus a kind of supplementary legislature is, as it were, created in the person of the Secretary of State to legislate for the conduct and management of dangerous trades.

It would appear to me from the provisions of the statute already referred to that this supplementary legislature is necessarily clothed with the power and authority, under the restrictions mentioned in s. 79, to impose positive duties and obligations which require the doing of prescribed acts, as well as negative obligations requiring abstention from the doing of other acts. If that be so it is necessarily clothed with power to prescribe who is to discharge those positive duties and obligations. A regulation requiring that a certain thing is to be done without expressly or impliedly naming or indicating who is to do it would be nugatory and futile. And while all provisions of the Act may be considered to throw light upon, and help to the construction of, some ambiguous provision contained in it, I do not think that the fact that in those provisions of the Act beyond the jurisdiction of the supplementary legislature, the duty of doing,

H. L. (I.) 1917

MACKEY v. JAMES HENRY MONKS (PRESTON).

Lord Atkinson.

or preventing or abstaining from the doing, of certain things is thrown upon the occupier of a factory or workshop, and upon him alone, affords any reasons for holding that the jurisdiction of the supplementary legislature is similarly restricted. No reason can be shown why, if that were the aim and intention of the Legislature, it should not have been clearly expressed. The provisions of the statute which I have referred to suggest, I think, the contrary. The essential condition, however, in reference to these regulations is that they should apply to machinery, plant, &c., used in a factory or in a workshop. And any difficulty which may be met with in this case arises from the provisions of s. 104 of the Act defining the meaning of the word "factory." The section is nothing but a glossary. It does not confer or restrict any power. It does not impose any duty or obligation on any person or class of person. Its definitions are not exhaustive. It is essential to keep this in mind. The regulations impeached in this case provide that the owner, master, or officer in charge of a ship shall comply with Part II. of the regulations. In my view the Secretary of State had power and jurisdiction, subject to the restrictions I have mentioned, to impose positive and negative obligations on each and every of these persons for the purposes of Part II., which provides that if a ship is lying at a wharf for the purpose of loading or unloading or coaling there shall be means of access for the use of the persons employed at such times as they have to pass from the ship to the shore and from the shore to the ship as follows: Where reasonably practicable, by a gangway of the kind described, or by other equally safe means. In other cases, a secure ladder of equal length. The words "means of access" mean, I think, in this connection, reasonably safe means of access. The jury have found that it was reasonably practicable to procure a gangway as a means of access from the shore to the ship; that the ladder employed was not secure, not reasonably safe for the purpose; that it was not at the time of the accident so placed as to be a safe means of access; and, as I have already pointed out, that the non-user of such a gangway as is prescribed by the statute was the proximate and direct cause of the death of the deceased. The unloading of the ship was a work that, according to strict legal right, should be half done by the owners. The cargo should be delivered by them on the rail of the ship to the consignee. Modern

facilities have brought about a different practice, but still the work of unloading is a work done for the benefit of the owners as well as that of the consignee; yet, notwithstanding this and the fact that the owner's agent, the master, was present, interfering actively in the selection and preparation of the means to be used for the unloading of the ship (for it was he who selected and placed the ladder unsecured), it is contended that his principal is not to be held liable for the negligence which caused the death of the deceased, because neither the ship nor the ladder, though in use, was a "factory" within the meaning of the definition clause, and, as I understand it, because the owner was not the "occupier" of it at the time the accident occurred. The ladder was undoubtedly "plant" within the words of the section. It was used at the time of the accident by persons employed to unload the ship. The fact that plant of a different description should have been used instead of it does not make it the less "plant." The statute is to apply to it as if the process for which it was used was a "manufacturing process," and as if the person who by himself or his agent or workman used it were the occupier. In my opinion the master of the ship used this ladder for the purpose of unloading his ship. That the stevedore also used it does not matter. There might be a joint user: *Bartell* v. *Gray & Co.* (1) User does not mean, I think, actual personal, physical user. He did not carry any of the cargo over it by himself, no more than did the stevedore, but he placed it there for the purpose of getting done the work of his principal, and it may be that he himself could be treated as the occupier; but, even if that be not so, it by no means follows that the owner should not be made responsible under the regulations for the neglect of his agent. If nobody but the occupier could be made liable there might be much in the respondents' contention, but the regulation imposes the duty equally on the master, owner, or officer in charge of the ship in reference to those provisions of Part II. which deal with a "factory" used in the process of loading or unloading. I do not think that the numerous authorities cited give much assistance. The preliminary objection to the hearing of the appeal was in my opinion quite unsustainable. For the

(1) [1902] 1 K. B. 225.

H. L. (I.) 1917

MACKEY v. JAMES HENRY MONKS (PRESTON).

reasons above mentioned I think the regulations assailed were not ultra vires, and that the appeal should be allowed.

LORD PARKER OF WADDINGTON. My Lords, the principal, if not the only, question which arises in this appeal is whether certain regulations purporting to have been made by the Secretary of State under the powers conferred on him by s. 79 of the Factory and Workshop Act, 1901, are good and valid regulations, or whether they are nugatory as being in excess of the powers referred to.

The 79th section of the Act is the first of a fasciculus of clauses entitled "Regulations for Dangerous Trades." It provides that where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour used in factories or workshops is dangerous or injurious to health, or dangerous to life or limb, either generally or in the case of women, children, or any other class of persons, he may certify that manufacture, machinery, plant, process, or description of manual labour to be dangerous, and thereupon the Secretary of State may, subject to the provisions of the Act, make such regulations as appear to him to be reasonably practicable, and to meet the necessity of the case.

My Lords, the powers thus conferred on the Secretary of State are in terms of the widest possible description. They undoubtedly authorize the imposition of duties, for otherwise no regulation would be of any avail. They prima facie, at any rate, authorize the imposition of a duty to do that which the regulations prescribe as well as a duty to forbear to do that which the regulations forbid. And again, the duties imposed may prima facie be imposed on any one on whom, in the opinion of the Secretary of State, it is reasonably necessary to impose duties in order to secure the end in view. The powers conferred by the section appear to be limited in two ways only: first, in making any regulations the Secretary of State must observe the provisions of the Act; secondly, the regulations he makes must appear to him to be reasonably practicable, and to meet the necessity of the case. The provisions of the Act which the Secretary of State must observe are those contained in ss. 80 and 81, and it is admitted that in making the regulations in question the Secretary of State did observe these provisions. The expression "reasonably practicable" means, no doubt, not only that the

regulations must be such as can be readily enforced, but that they can be so enforced without unduly interfering with the trade to which they relate. The expression "to meet the necessity of the case" obviously means to preclude or minimize the danger because of which the regulations are made. It should be observed that, with regard to the second limitation, the Secretary of State is constituted the sole judge, and if he has exercised a bona fide discretion his decision is final. It is not suggested that, in making the regulations in question, the Secretary of State acted otherwise than in perfect good faith. So far, therefore, as the 79th section taken alone is concerned, there is no case for holding that the regulations are ultra vires. The case for their being ultra vires depends entirely on further limitations which are said to be implied, either by the provisions of other sections contained in the fasciculus of clauses relating to regulations for dangerous trades or from the other provisions of the Act considered generally. I will ask your Lordships to consider in the first instance the other sections of the fasciculus of clauses in question. I may pass over ss. 80 and 81, to which I have already referred, and which are not relied on, observing only that no obligation can be imposed by the regulations on any one who has not had an opportunity of being heard and of having his objections (if any) fully considered.

My Lords, s. 82, sub-s. 1, provides that the regulations made under the 79th section may apply to all the factories and workshops in which the manufacture, machinery, plant, process, or description of manual labour certified to be dangerous is used, whether existing at the time when the regulations are made or afterwards established, or to any specified class of such factories or workshops. From this it appears that the expression "used in factories or workshops" in the 79th section is a generic description of what is referred to, and does not limit the power of making regulations to cases in which what is certified as dangerous is already in actual use.

Sect. 82, sub-s. 2, provides that in the case of tenement factories and tenement workshops the regulations may impose duties on occupiers who do not employ any person and on owners. To understand this provision it is, I think, necessary to refer to certain sections of the Factory and Workshop Acts, 1891 and 1895, which the Act of 1901 left unrepealed. By s. 8 of the Act of 1891 the

H. L. (I.) 1917

MACKEY v. JAMES HENRY MONKS (PRESTON).

Lord Parker of Waddington.

Secretary of State has a power of certifying somewhat similar to that contained in the 79th section of the Act of 1901, and upon such certification the chief inspector may serve on the occupier of the factory or workshop in which what is certified as dangerous is used a notice in writing proposing such special rules or requiring the adoption of such special measures as appear to the chief inspector to be reasonably practicable, and to meet the necessity of the case. In case the occupier does not serve notice of objection as therein mentioned, the proposed rules or the proposed special measures become obligatory on the occupier. If notice of objection be served the objection is considered by the Secretary of State, and if it be not assented to by him the matter goes to arbitration between him and the occupier, and the special rules or special measures as settled by the arbitrator become binding. The 24th section of the Act of 1895 deals with tenement factories, and provides, sub-s. 3, that s. 8 of the Act of 1891 shall, if and so far as in the case of a tenement factory the Secretary of State shall so direct, apply as if the owner of the factory were substituted for the occupier. I think the meaning of s. 82, sub-s. 2, is that, notwithstanding anything in the unrepealed provisions to which I have referred, regulations made under the 79th section may impose duties on occupiers as well as owners of tenement factories or workshops. I cannot think it implies that, except in the case of tenement factories or workshops, duties cannot be imposed upon owners.

Neither the 82nd nor the 84th sections have anything to do with the question your Lordships are considering, but the 85th section is of importance. The first sub-section imposes a penalty on any occupier, owner, or manager who, being bound to observe any regulation under the Act, acts in contravention of or fails to comply with such regulation. With regard to this sub-section, it should be observed that if any occupier, owner, or manager is bound to observe any regulation it must be by reason of the obligation being imposed on him by the regulation itself. There is no substantive provision of the Act imposing such obligation. The sub-section, therefore, contemplates that the Secretary of State may, by regulations made under the 79th section, impose duties on occupiers, owners, and managers. Further, the sub-section contemplates that the obligation so imposed may be either negative or positive:

otherwise there would be no sense in distinguishing the case in which the regulation is contravened from the case in which it has not been complied with.

Similarly, the 2nd sub-section of s. 85 contemplates that a person not being an occupier, owner, or manager may have duties either negative or positive imposed on him by the regulations, and imposes a penalty for the breach of duties so imposed. It contains, however, a provision that in such a case the occupier also is to be liable to a penalty unless he proves that he has taken all reasonable means by publishing and to the best of his power enforcing the regulations to prevent contravention thereof or non-compliance therewith on the part of the person on whom the duty is imposed by the regulations themselves. It is said that this last provision contemplates that the only persons (other than owners, occupiers, and managers) on whom the regulations impose a duty will be employees or other persons over whom the occupier has some control, and therefore impliedly limits the powers of the Secretary of State. I do not think this is necessarily so. The regulations must in any case be published by posting up copies thereof in the factory or workshop under s. 86, and the occupier is in any case obliged to see that this is done. Further, as to anything to be done or omitted by any person in a factory or workshop, the occupier of such factory or workshop must necessarily have some control. He is generally in a position, by virtue of his occupation, to see that the thing is done or omitted as required, upon whomsoever the duty is cast. So far as actual factories or workshops are concerned, it is possibly of little importance whether the persons on whom duties can be imposed are or are not limited as suggested. The importance of the question only becomes apparent when the power to make regulations is exercised with regard to notional factories under s. 104.

My Lords, the 104th section of the Act enacts (sub-s. 1) that the provisions of the Act with respect to (inter alia) regulations for dangerous trades shall have effect as if every dock, wharf, quay, and warehouse, and all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour, or canal, were included in the word "factory" and the purpose for which the machinery or plant is used were a manufacturing process, and as if the person who, by himself, his agents or workmen, uses such

H. L. (I.) 1917

MACKEY v. JAMES HENRY MONKS (PRESTON).

Lord Parker of Waddington.

machinery or plant for the before-mentioned purpose were the occupier of the premises, and for the purpose of the enforcement of those provisions the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the persons using any such machinery or plant, shall be deemed to be the occupiers of a factory, and (sub-s. 2) that for the purpose of this section the expression "plant" includes any gangway or ladder used by any person employed to load or unload or coal a ship.

I think it reasonably clear that this section does not itself impose any liability. It merely creates certain notional factories for the purposes of the other sections therein specified, and, inasmuch as some of these other sections impose a liability on the occupier, defines who is to be deemed the occupier, such a definition being necessary if the liability was to be enforced. For example, the liability of the occupier to post up notices under s. 86 would not be enforced unless it were possible to determine who the occupier was, and in the case of a notional factory it would, but for the definition in s. 104, have been impossible to determine this. On the other hand, none of the sections referred to imposes any liability on the owner. It was unnecessary, therefore, to define who should be deemed the owner of a notional factory for this purpose. It was equally unnecessary to define the owner for the purpose of making regulations under the 79th section if the persons on whom duties might be imposed by the regulations be not limited as suggested. Only if this limitation exists was it necessary to define who should be deemed the owner—how necessary will appear from the following considerations.

My Lords, the notional factory with which your Lordships are at present concerned is the machinery or plant used in the loading or unloading of a ship in any dock, harbour, or canal. A ship is loaded or unloaded either (1.) from wharf to ship, or vice versa, or (2.) from lighter to ship, or vice versa. The terminus a quo and the terminus ad quem of the operation may or may not be the property of the same owner. The notional "manufacturing process" of loading or unloading may be carried through by a stevedore employed either by the ship or the consignee or consignor of the goods. It may also be carried through by persons employed by the ship so far as operations on board the ship are concerned, and by persons employed by

the consignor or consignee so far as operations on the wharf or lighter are concerned. The machinery and plant used in the process may be partly on the ship and partly on the wharf or lighter. It may belong partly to the owner of the ship and partly to the owner of the wharf or lighter. Only in rare cases will any part of it belong to the stevedore, if a stevedore is employed. This plant or machinery must be provided and fixed in position before it can be used for loading or unloading. Until it be used there is no occupier of the notional factory, nor is there any such occupier when it ceases to be used. If under these circumstances the persons on whom liability can be imposed by regulations under s. 79 are confined to occupiers, I do not quite see how any reasonably practicable regulations to meet the necessity of the case could be made at all. Take, for example, the case of a gangway between ship and wharf, where the loading or unloading is carried out by a stevedore. If the gangway be such as is not permissible according to the regulations, the stevedore will infringe the regulations if he uses it or permits his workmen to use it, but unless he uses it by himself or his workmen he will not be the occupier, and cannot, according to the contention of the respondents, be saddled with any duty. The only practicable regulation would be one imposing an obligation to provide and fix the gangway either on the owner of the ship or the owner of the wharf. The same would be the case in respect of all the machinery and plant constituting the notional factory. So far as it was on the ship the only practicable way would be to impose the duty on the shipowner, and so far as it was on the wharf the only practicable way would be to impose the duty on the wharfowner. It would not be practicable to impose the duty on the stevedore or any other person, for neither the stevedore nor such other person would have the right to go on the ship or wharf to fix machinery or plant. His right would be to load or unload, using for that purpose the plant or machinery already there, which plant and machinery, if and when used, would constitute the notional factory.

If, therefore, the power of the Secretary of State to impose duties is limited as suggested, I should certainly have expected that the 104th section would have prescribed not only who is to be deemed the occupier but also who is to be deemed the owner of the notional

H. L. (I.) 1917

MACKEY v. JAMES HENRY MONKS (PRESTON),

Lord Parker of Waddington.

factory thereby created. The fact that it does not do so points, in my opinion, very strongly against there being any such limitation.

My Lords, I have carefully considered all the other provisions of the Act. By them obligations are imposed most generally upon occupiers, but sometimes on owners, sometimes on the employees of the occupier, and sometimes on others. I do not think that any of these provisions have any bearing on the construction of the 79th section. I am therefore of opinion that the powers of the Secretary of State under s. 79 enable him to impose duties either positive or negative on any person on whom it may be necessary to impose such duties in order to make the regulations reasonably practicable for the purpose of securing the end in view—that is to say, the safety of the persons whose danger formed the basis of his certificate.

My Lords, the regulation in question provides that it shall be the duty of the owner, master, or officer in charge of a ship to comply with Part II. thereof. Part II. provides that if a ship be lying at a wharf or quay for the purpose of loading or unloading or coaling there shall be means of access for the use of persons employed (that is, according to the definition clause, employed in the process of loading or unloading or coaling the ship) at such times as they shall have to pass from the shore to the ship as follows: (*a*) where a gangway is reasonably practicable, a gangway not less than 22 inches wide, properly secured and fenced throughout on each side to a clear height of 2 feet 9 inches by means of upper or lower rails, taut ropes or chains, or by other equally safe means.

There is no doubt that in the present case a gangway was reasonably practicable. There is no doubt that there was in fact no such gangway securely fixed, or indeed fixed at all. There was therefore a breach of the regulation on the part of the owner, master, or officer in charge of the ship. There is no question here of enforcing statutory penalties, so that it is unnecessary to determine whether, according to the true construction of the regulation, the duty imposed is on the owner or on the master or officer in charge. This is an action under Lord Campbell's Act, and in such an action the owner would, according to ordinary principles, be liable for the neglect of the master or officer in charge of the ship. The jury have found that the appellant's son met his death in consequence of there

being no securely fixed gangway. I see no reason to disturb this finding. The only question is whether this regulation was intra vires. I think it was. The only other person on whom the duty of providing and securely fixing the gangway could have been reasonably imposed would have been the owner of the wharf. Whether it should be imposed on the owner, master, or officer in charge of the ship rather than on the owner of the wharf was eminently a question to be decided by the Secretary of State, after hearing objections under s. 80 and holding the inquiry provided by s. 81. It could not have been reasonably practicable to saddle the stevedore with the duty in question.

My Lords, there was a preliminary objection based on the fact that His Majesty's Government are providing the appellant with means to prosecute this appeal in order to get the question of the validity of the regulations finally settled. It is said that this is maintenance : I doubt it ; but, whether it be maintenance or not, I cannot see how a wrong committed by persons in the service of the Crown could justify this House in depriving the appellant of his right of appeal. I know no case in which an action has been stayed on the ground that the plaintiff is being improperly maintained by a third party. The case of *Skelton* v. *Baxter* (1) is an authority the other way.

My Lords, for the reasons above stated I think this appeal should be allowed.

LORD PARMOOR. My Lords, I regret to have come to a different conclusion from that expressed in the opinions which have been delivered by your Lordships.

On the 27th day of March, 1914, the respondents' vessel was lying in the river at Waterford at a wharf known as McCullagh's Wharf. Messrs. McCullagh were the consignees of the cargo. They employed a stevedore named Keogh to discharge a cargo of coal. Keogh hired John Mackey, as one of a gang of dock labourers, to discharge the cargo, and the appellant is his father. John Mackey was working in the hold of the vessel during the unloading. The means of access between the vessel and the wharf consisted of a 14-foot ladder, one end of which rested on the vessel, the other on the quay. The

(1) [1916] 1 K. B. 321.

H. L. (I.) 1917

MACKEY v. JAMES HENRY MONKS (PRESTON).

Lord Parmoor.

position of the ladder varied with the state of the tide. At high water it assumed a horizontal position and became admittedly a dangerous method of access. At about 10.30 P.M. the gang working the vessel, including John Mackey, went on shore and returned about 11. The deceased was the last man to return to the quay, and was last seen alive within a step of the ladder. One of the gang, who had immediately preceded him, on reaching the vessel heard a splash and called out "A man in the water." The tide was ebbing. Bubbles, and what appeared to be a man's coat, were seen below the ladder about 6 or 8 feet down the river. The jury found that the death of Mackey was the result of a fall from the ladder and that the approximate and direct cause of his death was the non-user of a gangway, in accordance with certain statutory requirements. It was argued that there was not sufficient evidence to maintain the verdict of the jury; but this objection cannot be sustained, and the only question to be determined on this appeal is whether certain regulations made under the Factory and Workshop Act, 1901, are ultra vires, so far as they purport to throw the duty of complying with Part II. of such regulations on the owner, master, or officer in charge of a ship. The Court of King's Bench in Ireland decided by a majority that the regulations are ultra vires, and this judgment was confirmed by the Court of Appeal. I agree in the conclusions at which the Irish Courts have arrived, and think the appellant has not displaced the powerful reasoning contained in the judgment of Palles C.B.

In s. 79 of the Factory and Workshop Act, 1901, which is one of the sections under the heading "Regulations for Dangerous Trades," the Secretary of State may, if satisfied that a process (inter alia) used in factories or workshops is dangerous or injurious to health or dangerous to life or limb, either generally or in the case of women, children, or any other class of persons, certify that the process is dangerous. Prior to the issuing of the regulations in question on this appeal the Secretary of State did certify the processes of loading, unloading, moving, and handling goods in, on, or at any dock, wharf, or quay, and the processes of loading, unloading, and coaling any ship in any dock, wharf, or canal, as dangerous in pursuance of s. 79 of the Act of 1901. Sect. 79 further enacts: "and thereupon the Secretary of State may, subject to the

provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case." These words give a wide discretion, and so long as the Secretary of State acts within the power which the statute has conferred upon him no Court has power to interfere. The discretion of the Secretary of State must, however, be exercised " subject to the provisions of this Act." I agree with Palles C.B. that if these words had not been in terms inserted the same limitation would be implied. In my opinion the provisions of the Act do not authorize the Secretary of State to place the duty to comply with Part II. of the regulations on the owner of a ship.

In order to understand the nature of the certificate issued by the Secretary of State, prior to the issue of the regulations, it is necessary to consider s. 104 of the Act. In this section the provisions of the Act with respect to five specified matters " shall have effect as if every dock, wharf, quay and warehouse and all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour or canal, were included in the word ' factory.' " These words constitute a notional factory where machinery or plant is used, and only so long as it is used, in the process of loading or unloading. There is a further provision : " and the purpose for which the machinery or plant is used were a manufacturing process." I understand this to mean that the process of loading or unloading is made by statute a manufacturing process. It was this process that the Secretary of State certified to be dangerous, as he without question had a right to do. Next follows a definition of the occupier of the notional factory : " as if the person who by himself, his agents or workmen uses any such machinery or plant for the before-mentioned purpose were the occupier of the premises." It should be stated that the occupier of a factory or workshop is a person on whom responsibility is thrown, in a large number of sections in the Act of 1901, but no general inference can be drawn from this, since in other sections the owner is made responsible, and there are some cases in which responsibility is placed on persons who are neither occupiers nor owners. The section further enacts : " and for the purpose of the enforcement of those provisions the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof and the

H. L. (I.) 1917

MACKEY v. JAMES HENRY MONKS (PRESTON).

Lord Parmoor.

person so using any such machinery or plant shall be deemed to be the occupier of a factory." Sect. 104 is not a section which imposes any penalty ; but it does provide that, for the purpose of the enforcement of the provisions of the Act with respect to (inter alia) regulations for dangerous trades, a person so actually using any such plant or machinery shall be deemed to be an occupier of a factory, and thus brings such person within the penalty, which the Act may authorize, in reference to the specified matters. On the other hand, there is no definition of " owner " of the notional factory, and the general definition of owner, that it has the meaning given to it by s. 4 of the Public Health Act, 1875, is clearly quite inapplicable.

Sub-s. 2 of the section does not carry the matter any further. It enacts that for the purposes of the section the expression " plant " includes any gangway or ladder used by any person employed to load or unload or coal a ship, and that the expressions " ship " and " harbour " have the same meaning as in the Merchant Shipping Act, 1894.

Sect. 104 includes specified matters in addition to " regulations for dangerous trades." A reference to each of these matters shows that liabilities are imposed by the Act on persons who come within the definition of occupier in the section. For the purpose of making clear who that person should be it was advisable, or necessary, to insert the definition which is given in s. 104. The question in this appeal is whether any duty or liability can be imposed on the owner of a ship by a regulation made under s. 79 of the Act. This is a question of construction.

I agree with the conclusion expressed in the judgments in the Court below, that if such a duty or liability can be imposed on the owner of a ship, then it must be found in the terms of the Act. No greater effect can be attributed to a regulation made by the Secretary of State than if the regulation had been inserted in the Act, enjoining the doing, or omission of a particular thing. For this purpose I would read Part II. of the regulations as though it had been contained in a section or sections of the Act and then ask on whom the Act authorizes the duty of compliance to be imposed. In other words, the person on whom a duty and liability can be placed in the regulations is to be ascertained, not from the regulations, but from the Act. This does not mean that the Secretary of

State cannot specify in the regulations the persons or class of persons on whom it is desired to impose a duty or liability, but simply that no persons or class of persons can be specified except such as, under the terms of the Act, are capable of being made subject to any such duty or liability. In the present appeal the question is whether the owner of a ship can be made liable by regulations. I do not doubt the power of the Secretary of State to specify the persons or class of persons on whom he desires to impose a duty or liability so long as he is acting within the authority given to him by the Act.

Turning then to the Act, the duty and liability under the sections which relate to dangerous trades are to be found in s. 85, and there are no other sections immediately relevant. Sect. 85, sub-s. 1, places the liability and consequent penalty on "any occupier, owner or manager, who is bound to observe any regulation under this Act." This provision does not in any sense determine whether or not a particular person is bound to observe a regulation, but no one who is not either an occupier, owner, or manager can come within its operation. It was necessary to include "owner" having regard to s. 82, sub-s. 2, and the whole Act shows the reason for including an occupier or manager. A ship is not a factory, and the owner of a ship is not in any sense an owner of a factory within the definition section of the Act. So far, therefore, as s. 85, sub-s. 1, is concerned, the Act certainly does not include an owner of a ship as a person capable of being made liable for acting in contravention of, or failing to comply with, a regulation. It makes no difference that the regulation is made under powers conferred on the Secretary of State and not in terms inserted in the statute.

The same criticism applies, in my opinion, to s. 85, sub-s. 2. This sub-section enacts that if any person other than an occupier, owner, or manager who is bound to observe any regulations under the Act acts in contravention of, or fails to comply with, the regulation, he shall be liable to certain penalties, and that the occupier of the factory or workshop shall also be liable to a fine, unless he proves that he has taken all reasonable means by publishing, and to the best of his power enforcing, the regulations to prevent the contravention or non-compliance. It was argued on behalf of the appellant that the owner of a ship would be a person other than the occupier, owner, or manager capable of being made liable under this sub-

H. L. (I.)
1917
MACKEY
v.
JAMES HENRY MONKS (PRESTON).
Lord Parmoor.

section, and that the imposing of a duty on such owner as proposed in the regulations was not ultra vires. Adopting the construction of the Act which I have already explained, I agree that if the owner of a ship could be brought within the definition "any person other than an occupier, owner, or manager" there would be found in the Act a section which might impose a liability on him, placing the regulations on the same basis as though they had in terms been inserted in the Act as statutory requirements. I am unable to accept any construction of s. 85, sub-s. 2, which could bring an owner of a ship within its terms in reference to the notional factory as defined in s. 104. It seems to me to be clear that any person other than an occupier, owner, or manager is not any person whom the Secretary of State may include in his regulations, but only a person to whom notice of the regulation has been or should have been published by the occupier, and which the occupier is in a position to enforce by all reasonable means. This limitation is necessarily implied in the alternative liability for fine in the latter part of the section, and it would be extravagant to suggest that the owner of a ship does come, or was ever intended to come, within this sub-section. The provision for the proper publication of regulations is to be found in s. 86, and if the occupier of any factory or workshop fails to comply with any provision of the sections as to posting or giving copies he is liable to a penalty not exceeding 5*l*.

It was argued on behalf of the appellant that it would be convenient, and add to the protection of workmen in dangerous trades, to place a liability on the owner of a ship. A Court cannot consider such matters in a question of ultra vires, and I think that it is essential to draw a distinction between matters of legislation and matters of judicial interpretation, and that your Lordships are only concerned with a question of construction. It was further pointed out that there was a careful procedure to be followed before regulations were made, that inquiries were directed to be held at which any person affected had a right to be present, and that the regulations did not come into force until they had been laid before both Houses of Parliament. No doubt these precautions are of great importance, but they do not affect the question in debate before your Lordships. As stated above, I think that the regulations may be regarded as though they were statutory in terms, subject to the provisions of the

Act, which create liability on persons who act in contravention of them or fail to comply with them. Your Lordships' attention was further directed to a large number of sections in other parts of the Act and to some cases. I do not think that the sections referred to do more than exemplify the general character of the Act, and that it is not material that in most of these sections the occupier of a factory is rendered liable. The question is whether under the few immediately relevant sections a duty may be imposed on the owner of a ship, and it would make no difference that in other sections only the occupier has been rendered liable, if in a particular case the liability may be placed upon the owner of a ship. As regards the cases, I agree with the counsel for the appellant and do not appreciate their relevancy.

My Lords, in my opinion the judgment of the Irish Courts is correct, and the appeal should be dismissed.

LORD WRENBURY. My Lords, for the present purpose the construction of the Factory and Workshop Act, 1901, is best approached by considering in the first instance the meaning of s. 104. Reading the relevant words, that section enacts that the provisions of the Act with respect to regulations for dangerous trades shall have effect as if all plant used in unloading a ship in a dock, harbour, or canal were included in the word "factory" and the purpose for which the plant is used were a manufacturing process, and as if the person who by himself, his agents or workmen, uses any such plant for the before-mentioned purpose were the occupier of the premises, and for the purpose of the enforcement of those provisions the person so using any such plant shall be deemed to be the occupier of a factory. By sub-s. 2 "plant" includes any gangway or ladder used by any person employed to unload a ship.

I note that the section consistently and without exception employs the verb "use." It speaks of the plant "used," of the person who "uses," or the person "using." Further, "plant" does not include a gangway unless it be "used" by a person employed to unload. The expression "occupier of the premises" must mean "occupier of the factory," i.e., of the notional factory, constituted, according to the Act, by a gangway in use. This agrees with the concluding words of sub-s. 1, "occupier of a factory."

H. L. (I.) 1917

MACKEY v. JAMES HENRY MONKS (PRESTON).

Lord Wrenbury.

A ship is not a factory. A gangway is not a factory. A gangway supplied for use is not a factory. But a gangway in use is a factory, and the person who uses it is carrying on a manufacturing process. That, so far, is the effect of the Act.

Next I turn to s. 79. Reading again the relevant words, that section enacts that when the Secretary of State is satisfied that any plant, process, or description of manual labour used in factories is dangerous he may certify that plant, process, or description of manual labour to be dangerous, and may, subject to the provisions of the Act, make such regulations as appear to him to be reasonably practicable, and to meet the necessity of the case.

Plant (including a gangway) used in unloading is by s. 104 to be a "factory," and the purpose for which the gangway is used is by s. 104 to be taken to be a manufacturing process. The Secretary of State may certify the process to be dangerous. If he does, the person who used the plant (s. 104) is to be deemed the occupier of a factory (namely, a gangway in use), and for the purpose of enforcing the provisions of the Act with respect to regulations for dangerous trades the person who uses is to be deemed such an occupier.

Under these provisions the Secretary of State on October 24, 1904, certified that the process of unloading was dangerous. He did not certify that any physical thing (e.g., a gangway of particular construction) was dangerous. He certified a process to be dangerous and has made regulations for the protection of persons employed in the process.

The Act empowers regulations, but does not, so far as I can find, define the persons or class of persons who shall be bound to observe the regulations. It has been argued that a general review of the Act leads to the conclusion that the Act does define the party liable, and that he is the occupier of the factory and no one else. With this argument I do not agree. There is good ground, I think, for the contention that the Act in many places discriminates between owner and occupier, but I cannot find that, if "the necessity of the case" so requires, it is ultra vires to make a regulation binding the owner or any one else. There are many cases in which it may be necessary for safety to provide by regulation that a person other than either the owner or the occupier—a workman, for instance—shall

not do a certain act—say, oil machinery in motion. The Secretary of State could, I think, make a regulation binding upon him. The case does not, I think, turn on these considerations.

The person whose liability is here in debate is the shipowner. He was not engaged by himself, his agents or workmen, in the process. The exact question for decision is this: Does the Act give the Secretary of State jurisdiction to make a regulation binding upon a person who is neither owner of the factory nor occupier of the factory, nor employed in the factory, a person who, in fact, has nothing to do with the factory and is not carrying on the manufacturing process? I think not.

For the purpose of construing the Act I have, of course, left out of consideration altogether the regulations which have been made. They can throw no light at all upon the construction of the Act. But for purposes of illustration I will refer to one of the regulations in Part II., namely, regulation No. 6. It provides that there shall be maintained safe means of access by ladder or steps from the deck to the hold. By the clause under the head "Duties" it is the duty of the owner, master, or officer in charge of a ship to comply with Part II. As a ship is not a factory the imposition of that duty upon the owners of the ship as such would be ultra vires. It is said that if this is so regulation No. 6 becomes otiose, for if the ladder or steps are not supplied they, of course, cannot be used, and unless they be used there is no notional factory—the ship is not one and the ladder or steps are not existent. This is true. But it does not in the least go to show that the Act is to be construed so as to make it effectual. It only goes to show that the Act has not provided for that case.

Considerable reliance was placed in argument upon s. 85. It contemplates that an occupier, an owner, a manager, and any other person may be bound to observe a regulation made under the Act. This assists the argument (which, as I have said, is in my judgment well founded) that the Act has not sought to define, but has left "the necessity of the case" to delimit, the persons who may by regulation be made bound to observe regulations. But it does no more. It does not, any more than s. 104, determine who shall be liable.

The facts of the case are that the consignees of cargo and a

H. L. (I.) 1917 — MACKEY v. JAMES HENRY MONKS (PRESTON). — Lord Wrenbury.

stevedore employed by them were unloading a ship. The shipowner was not by himself, nor was he by his agents or workmen, engaged in the operation. The shipowner had supplied the ship with a ladder. He had also supplied it with a proper gangway. The parties who were unloading the ship did not use the gangway but used the ladder, and did such acts as that the ladder became by reason of their user of it a factory. The shipowner had no lot, part, share, or interest in that notional factory. The regulations could not, in my judgment, affect him any more than they could affect a bystander who was looking on at the operation.

The only way that I can see in which the shipowner could be brought within the Act is by reading the word "used" as meaning "supplied for use." If plant supplied for use is a "factory" before it is used, then the shipowner who supplies it supplies "plant," which upon this hypothesis is a factory. If so he is the owner of a factory, and regulations made under the Act might, I daresay, under the words in s. 79 "the necessity of the case," reach him. But liability cannot be attributed to the shipowner on this ground for two reasons. First, in my judgment a gangway is not a factory before it is used. The whole frame of s. 104 contradicts such a view, and s. 79, in speaking of "plant used in factories," shows that the plant spoken of is not the factory itself, but the thing used in the factory. Secondly, the Secretary of State has not made, even if he could have made, any regulations except as to a process. A gangway supplied for use is not a process.

I cannot myself allow the opinion I have to form upon the construction of the Act to be influenced in any way by the contents of the regulations. If, as may be, the construction I put upon the Act makes many of the regulations ultra vires, so be it. The very question I have to investigate is whether in the relevant respect they are ultra vires or not. For the purpose of this opinion I assume that the regulations, properly read, provide that the owner of the ship (see head "Duties") shall provide means of access as in Part II., par. 4. That regulation is, I think, ultra vires. There is under the Act no power in the Secretary of State to render liable a person who was not by himself, his agent or workmen, a party to the process certified as dangerous.

My Lords, for these reasons I think that the decisions in the

King's Bench Division and the Court of Appeal in Ireland were right, and that this appeal should be dismissed.

H. L. (I.) 1917 MACKEY v. JAMES HENRY MONKS (PRESTON).

Order of the Court of Appeal in Ireland reversed and judgment entered for the appellant. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, October 29, 1917.

Solicitor for appellant: *Treasury Solicitor, for Treasury Solicitor in Ireland.*

Solicitors for respondents: *Beveridge & Co., for I. Thornton & Son, Waterford.*

[IN THE HOUSE OF LORDS.]

BECKER, GRAY AND COMPANY . . . . APPELLANTS;
AND
LONDON ASSURANCE CORPORATION . . RESPONDENTS.

H. L. (E.)* 1917 *Oct.* 29.

Insurance (Marine)—Goods—Constructive Total Loss—Restraint of Princes—Declaration of War—Men-of-War—Peril of Capture—Ship putting into Neutral Port to avoid Risk of Capture—British Goods on German Ship—Loss of Adventure—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 55, 60.

The plaintiffs shipped goods on board a German ship for carriage from Calcutta to Hamburg and insured them on that voyage with the defendants against the usual perils, including men-of-war, enemies, and restraints of princes. While the goods were at sea war broke out between Great Britain and Germany, and the master, on being informed of that fact, put into a neutral port to avoid the risk of capture by hostile cruisers and with the intention of suspending the further prosecution of the voyage until after the termination of the war, and the voyage was thereupon abandoned. The plaintiffs gave notice of abandonment to the defendants and claimed as for a total loss. There was no evidence that the ship had been chased by any hostile cruiser, but, in the opinion of the Lords of the Admiralty, she would have been in peril of capture if she had proceeded on her voyage:—

Held, that the frustration of the adventure was caused, not by a peril insured against, but by the voluntary act of the captain

---

* *Present:* EARL LOREBURN, LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD WRENBURY.

H. L. (E.)
1917
BECKER, GRAY AND COMPANY v. LONDON ASSURANCE CORPORATION.

in putting into a port of refuge to avoid risk of capture, and that the plaintiffs were not entitled to recover.

Observations of Lord Sumner as to the causa proxima rule.

British and Foreign Marine Insurance Co. v. *Sanday & Co.* [1916] 1 A. C. 650 distinguished.

Decision of the Court of Appeal [1916] 2 K. B. 156 affirmed.

APPEAL from a decision of the Court of Appeal (1) affirming a decision of Bailhache J. (2)

In June, 1914, the appellants, a firm of British merchants, sold in Calcutta to German buyers 500 bales of jute for shipment to Hamburg upon the terms that the property was not to pass until the arrival of the goods at the port of destination and payment of the price. In part fulfilment of their contract, at the end of June and the beginning of July they shipped 218 bales on board the German steamship *Kattenturm* for carriage from Calcutta to Hamburg, and they insured the goods for the voyage with the respondents by a policy of marine insurance dated July 28, 1914. The clause "warranted free from capture, seizure, &c." was struck out in consideration of an extra premium. The perils insured against included "men of war . . . . enemies . . . . takings at sea, arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality soever."

The ship sailed from Calcutta for Hamburg and arrived at Malta on August 1, 1914. She left Malta on August 3. At 11 P.M. on August 4, war, which had already broken out between the German Empire and France, was declared between Great Britain and the German Empire. On August 6 the master put in to Messina, then a neutral port, to avoid the risk of capture, and after lying there for about a month proceeded to Syracuse.

On September 1, 1914, the appellants gave notice of abandonment to the respondents, stating that the 218 bales of jute were "a constructive total loss through consequence of hostilities," and on the following day the respondents declined to accept the notice, but agreed to the appellants being in the same position as if a writ had been issued.

On October 28, 1914, the Italian Government made a decree, which came into operation on November 5, 1914, forbidding the export of raw jute.

(1) [1916] 2 K. B. 156. (2) [1915] 3 K. B. 410.

On November 11, 1914, the appellants (through the British Consul at Rotterdam and with the sanction of the Board of Trade) communicated with the Hansa Company at Bremen, who were the owners of the ship, in order to ascertain whether they would be willing to deliver up such portions of the cargo as belonged to the plaintiffs and upon what terms. On November 20, the company replied that the German Government had issued a prohibition against delivering goods to British subjects, and this reply was forwarded to the respondents on November 30. On December 16, 1914, the appellants through their solicitors gave a second notice of abandonment founded on the reply of the German company, and on December 17, on the refusal of the respondents to accept the abandonment, the appellants commenced this action against the respondents, claiming the sum of 1380*l.* as for a total loss under the policy of insurance.

Eventually the jute was sold to an Italian company for 1051*l.* and the purchase-money was duly paid, but by arrangement the steps taken for obtaining and disposing of the cargo in Italy were taken without prejudice to the rights of the parties.

At the trial of the action, by agreement between the parties, a letter dated June 28, 1915, from the Admiralty to the appellants' solicitors was put in and was treated as evidence in the case. It was in the following terms : " With reference to your letter of the 22nd instant, relative to proceedings in the High Court of Justice by your clients Messrs. Becker, Gray & Co. against the London Assurance Corporation in respect of certain bales of jute forming part of the cargo of the German s.s. *Kattenturm* stated to have been bound from Calcutta to Hamburg in August last and to have taken refuge at Messina and afterwards at Syracuse in order to avoid capture by British or French warships, I am commanded by my Lords Commissioners of the Admiralty to inform you that any German steamer proceeding on or after the 5th August last through the Mediterranean on a voyage to Hamburg would, in their Lordships' opinion, have been in peril of capture by British or allied warships when outside neutral territorial waters."

Bailhache J. held that the goods were not lost by any peril insured against, but that the loss arose from steps taken by the captain to avoid a peril which had not begun to operate, and his judgment was

H. L. (E.) 1917

BECKER, GRAY AND COMPANY v. LONDON ASSURANCE CORPORATION.

affirmed by the Court of Appeal (Swinfen Eady L.J., Pickford L.J., and Bankes L.J.).

1917. March 19, 20, 22, 23; July 12. *Sir John Simon*, *K.C.*, and *R. A. Wright*, for the appellants. 1. This adventure was frustrated by a restraint of princes. The declaration of war between Great Britain and Germany was a restraint of princes, and the effect of it was thenceforward to render illegal the adventure of sending these British-owned goods to Hamburg. The declaration of war dissolved the contract of affreightment—*Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (1)—and was the immediate and direct cause of the destruction of the subject-matter of the insurance: *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (2) It is true that in that case the ships were British, but the nationality of the ship has nothing to do with the destruction of the adventure of the goods. The reason why the adventure has become frustrated by the declaration of war is not because the ship is an enemy ship, but because the goods are going to an enemy destination. The adventure necessitates commercial dealings between the appellants and a German shipowner in a German port, and that is illegal. There was here, therefore, an effective restraint of princes preventing the prosecution of the adventure: *Nobel's Explosives Co.* v. *Jenkins & Co.* (3) [They also referred to *Dixon* v. *Reid* (4) and *Nickels & Co.* v. *London and Provincial Marine and General Insurance Co.* (5)]

2. There was a constructive total loss of the goods by peril of capture. When the ship put into Messina she was in the zone of danger and was in actual imminent peril of capture. The master put into a port of refuge under the stress of an existing and operating peril of capture and not as a voluntary act to avoid entering the sphere of peril: *Geipel* v. *Smith* (6); *Rodocanachi* v. *Elliott.* (7) As regards getting out of the Mediterranean there was on August 6 just the same kind of restraint as there was in *Rodocanachi's Case* (7) as regards getting out of Paris, and there was not in any relevant sense any voluntary act at all. It is not necessary for the peril to operate

(1) [1915] 2 K. B. 379, 389; [1916] 1 K. B. 495, 505.
(2) [1916] 1 A. C. 650.
(3) [1896] 2 Q. B. 326.
(4) (1822) 5 B. & Al. 597.
(5) (1900) 6 Com. Cas. 15.
(6) (1872) L. R. 7 Q. B. 404.
(7) (1873-4) L. R. 8 C. P. 649, 665; L. R. 9 C. P. 518.

that the master should go on and get captured. *Kacianoff* v. *China Traders Insurance Co.* (1) is distinguishable, because there the vessel had never started at all. Upon the construction of a policy of marine insurance there must be a close connection between the peril and the loss—that is what is meant by saying that it is the proximate cause which must be looked at; but this has been proved here by the letter of the Admiralty: *The Knight of St. Michael* (2); *Ionides* v. *Universal Marine Insurance Co.* (3); *Butler* v. *Wildman* (4); *Reischer* v. *Borwick* (5); Phillips on Insurance, 5th ed., vol. 1, par. 1115, p. 655. In *Hadkinson* v. *Robinson* (6) it was held that the ship put into a neutral port to avoid a peril which had not begun to operate, but in weighing that decision it must be remembered that modern conditions of warfare have enormously increased the liability to capture. [They also referred to *Wilson Brothers, Bobbin & Co.* v. *Green* (7) and Arnould on Marine Insurance, 9th ed., vol. 2, s. 822.]

3. There was a constructive total loss by enemies, in that the captain refused to deliver up the goods to the appellants in obedience to the orders of the German Government.

Leslie Scott, K.C., and *Adair Roche, K.C.* (with them *T. Mathew*), for the respondents. As to loss by enemies, the refusal of the captain to give up the goods in neutral territory was a civil wrong and he could have been compelled to give them up. As to peril of capture, there are concurrent findings of fact by the Courts below that the vessel was turned aside to avoid loss by the peril and was not within the operation of the peril at the time, and unless those findings are plainly wrong this House will not interfere with them. There is a definite distinction between loss by an insured peril and turning aside to avoid the peril, and this distinction has been recognized in cases of marine insurance for more than a century. Apprehension of peril is not enough; there must be certainty in fact. Even in the case of an effective blockade, if a vessel turns aside that does not justify a notice of abandonment. *Geipel* v. *Smith* (8) has no application, because that was not a case

(1) [1913] 3 K. B. 407; [1914] 3 K. B. 1121.
(2) [1898] P. 30.
(3) (1863) 14 C. B. (N.S.) 259, 286.
(4) (1820) 3 B. & Al. 398.
(5) [1894] 2 Q. B. 548.
(6) (1803) 3 Bos. & P. 388.
(7) (1915) 31 Times L. R. 605.
(8) L. R. 7 Q. B. 404.

H. L. (E.) 1917

BECKER, GRAY AND COMPANY v. LONDON ASSURANCE CORPORATION.

of a policy of assurance, which by our law is dealt with on a special footing: Arnould on Marine Insurance, 9th ed., vol. 2, s. 804. In *Hadkinson* v. *Robinson* (1) there was an actual impossibility of entering the port of destination, but it was held that there was no loss because the captain decided not to bring himself within the danger; and the reason for that decision was that any departure from the salutary rule of causa proxima would be to penalize the underwriters by making them liable for a loss for which they were not liable by the terms of the policy and to penalize the assured by raising the premiums. The application of that doctrine is a recognized mark of distinction between a policy of marine insurance and a contract of affreightment. The test is whether the operation of the peril upon the subject-matter of the insurance has reached practical certainty. Loss by capture means that the ship must be captured; it does not mean loss by danger of capture. This is illustrated by *Lubbock* v. *Rowcroft* (2), *Forster* v. *Christie* (3), and *Nickels & Co.* v. *London and Provincial Marine and General Insurance Co.* (4)

Hadkinson v. *Robinson* (1) was expressly followed in the United States by Story J. in *Smith* v. *Universal Insurance Co.* (5), and it has been recognized as an authority by Pickford J. in *Kacianoff* v. *China Traders Insurance Co.* (6), by Stirling L.J. in *Miller* v. *Law Accident Insurance Co.* (7), and by Serjeant Marshall in his Law of Marine Insurance, Part I., c. 7, s. 2. *Reischer* v. *Borwick* (8) was wrongly decided. Assuming that there was a constructive total loss by peril of capture, the voyage was abandoned when the ship put in at Messina, and therefore the notice of abandonment was not in time. As to loss by restraint of princes, *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (9) is distinguishable, because in that case both the ships were potentially though not physically restrained. Mere illegality is not a restraint of princes, and that case does not so decide. Here the only restraint on the cargo was exercised by the captain himself. The arrival of the goods at Hamburg was not hindered because it was illegal for the cargo

(1) 3 Bos. & P. 388.
(2) (1803) 5 Esp. 50.
(3) (1809) 11 East, 205.
(4) 6 Com. Cas. 15.
(5) (1821) 6 Wheat. 176.
(6) [1913] 3 K. B. 407.
(7) [1903] 1 K. B. 712.
(8) [1894] 2 Q. B. 548.
(9) [1916] 1 A. C. 650.

owner to take the goods there, for he had no control over them, and goods are not lost if they are in an enemy country: *Moore* v. *Evans*. (1)

Sir John Simon, *K.C.*, in reply, referred to *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (2), *The Xantho* (3), *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (4), and *Watts, Watts & Co.* v. *Mitsui & Co.* (5)

The House took time for consideration.

Oct. 29. EARL LOREBURN. My Lords, I agree with the order appealed from because it seems to me that both parties have accepted as sufficient the Admiralty statement that a German steamer would have been "in peril of capture" if she proceeded on or after August 5 on a voyage to Hamburg. They have left that evidence there without more. It is therefore the measure of the danger which the ship would have run in proceeding on this voyage. That will not be enough for the plaintiffs' case. I should have thought that capture would have been a certainty, but I have no right to act upon my own beliefs or conjectures upon a question of fact when there is evidence on which the parties rely. And there may be very good reasons of which I am unaware for being content with the Admiralty view.

LORD DUNEDIN. My Lords, I think that the facts of the case, and the law applicable thereto, were so clearly and accurately stated by Bailhache J., the trial judge, that in truth there is little left to add. His judgment was confirmed unanimously by the learned judges of the Court of Appeal.

If there were no decisions on the point, and the expression "men-of-war, enemies and restraints of princes," as used in a policy of insurance, had to be considered for the first time, it might not be difficult to say that the adventure in this case was frustrated by the outbreak of war and, that being so, to hold that it fell within the words as above. This indeed is the result at which the jurists of the Continent and of America have arrived. Thus Phillips on

(1) [1917] 1 K. B. 458.
(2) (1887) 12 App. Cas. 484.
(3) (1887) 12 App. Cas. 503.
(4) (1887) 12 App. Cas. 518.
(5) [1917] A. C. 227.

H. L. (E.) 1917

BECKER, GRAY AND COMPANY v. LONDON ASSURANCE CORPORATION.

Lord Dunedin.

Insurance (c. 13, sec. x., par. 1115), after stating the question "Whether a loss consequent upon the imminency of a capture, arrest, restraint, or detention, is within the risk assumed by insurance against such perils," cites Emerigon and other foreign jurists, and pronounces the correct rule to be as follows: "Where, after the risk has begun, the voyage is inevitably defeated by blockade, or interdiction at the port of departure, or destination, or by a hostile fleet being in the way, rendering the proceeding upon it utterly impracticable, or capture or seizure so extremely probable that proceeding would be inexcusable, the risk continues till the vessel has arrived at another port of discharge adopted instead of that originally intended: and also that an assured on the cargo has a right to abandon."

The English authorities have not adopted this rule. They have followed the view of Lord Alvanley expressed in the case of *Hadkinson* (1) in 1803. The current of authority is unbroken, and the case of *Kacianoff* (2) may be taken as a modern example. We are asked to construe an expression in a mercantile document of ancient origin, interpreted by decisions that have stood for more than a century. In such a case the only safe rule for a Court is *Stare decisis*. I do not cite the cases, because that has been done in the Courts below.

In accordance with the English rule the question to be asked is, Was the frustration of the adventure due to a peril, or to something done in order to avoid a peril? The onus to show that the loss was due to a peril is on the appellants. How do they seek to show it? What they really urge may be reduced to two things: first, the fact of the master putting into Messina instead of going on; second, the statement by the Admiralty that in their opinion a vessel proceeding on or after August 5, 1914, through the Mediterranean on a voyage to Hamburg would have been in peril of capture by the allied fleets.

Now the first fact is equally consistent with conduct to avoid a peril as with the existence of a present and actual peril; and the second fact is far short of proof of actual peril to the ship. The letter is entirely vague—indeed it could not be otherwise—as to when the peril would begin or become imminent. I am of opinion, there-

(1) 3 Bos. & P. 388. (2) [1913] 3 K. B. 407.

fore, that the appellants fail to discharge the burden upon them, and that is enough; though if I had to decide positively I should decide as Bailhache J. did—that the captain went into Messina to avoid a peril and not under the stress of an actual peril.

There remains the argument founded on the decision of this House in *Sanday's Case*. (1) The direct application of that case fails for the simple reason that this was a German ship, and that there was no illegality in the master continuing the voyage if he thought fit. He did not think fit, and his action it was that terminated the adventure. *Sanday's Case* (1) was not intended to decide, and did not decide, that by the mere declaration of war all goods in transitu to a German port or town were constructively totally lost. It was urged that in this case in terms of the policy the risk continued till the goods were delivered to the consignee, and as the consignee could not get delivery without paying freight to the German captain—which would be trading with the enemy—that constituted a loss of the adventure of the same character as in *Sanday's Case*. (1) The answer lies in the facts. It was not the impossibility of paying freight but the conduct of the captain that actually put an end to the adventure. The same doctrine of causa proxima which decides the first point decides this also.

I think the appeal should be dismissed.

Lord Atkinson. My Lords, I have not found any reason to change the opinion I ventured to express in *Sanday's Case* (2) to the effect that the old cases of *Hadkinson* v. *Robinson* (3) and *Lubbock* v. *Rowcroft* (4) established the principle which has since then been consistently applied in this country, that what is insured against in policies of assurance such as that effected in the present case is the peril of actual capture, not the mere apprehension of capture. I do not attempt to give a general definition of what amounts to actua capture. It may vary in each case with the circumstances, the discoveries of science applicable to navigation, and the operations of ships of war in naval warfare; but I fully concur with the judgment about to be delivered by or on behalf of my noble and learned friend Lord Sumner in this as on all other points dealt with by him, that

(1) [1916] 1 A. C. 650.
(2) [1916] 1 A. C. 665.
(3) 3 Bos. & P. 388.
(4) 5 Esp. 50.

H. L. (E.) 1917

BECKER, GRAY AND COMPANY v. LONDON ASSURANCE CORPORATION.

nothing approaching to anything that could be considered actual capture was proved to have occurred in the present case.

LORD SUMNER. My Lords, the *Kattenturm* left Malta, westward bound, on August 3, 1914. The next that is known of her is that the captain took her into Messina on the 6th, saying that he did so to avoid capture. Between the 3rd and the 6th he had found out that Germany was at war. How or when he learned this, why he chose Messina as his port of refuge, whether he so much as saw a hostile vessel or was seen by one, we do not know. To sail direct from Malta to Messina need not have taken three days. No doubt, after proceeding some substantial distance on his course, he turned back, but anything beyond that is guesswork. He may have counted on a short war and have expected to go on again soon, but I think he abandoned the voyage to Hamburg when he bore up for Messina. No point, however, has been made that, with the abandonment of the voyage, the voyage policy also determined so as to discharge underwriters from a loss only caused thereafter, and I will not pursue the subject. There is evidence of the existence of peril of capture from August 5 onwards, but it is carefully limited. The Admiralty's reply to an inquiry made on the plaintiffs' behalf, which is not before us, has been accepted as admissible evidence. It states that "any German steamer proceeding on or after the 5th August through the Mediterranean on a voyage to Hamburg would have been in peril of capture . . . . when outside neutral territorial waters." That is all. We know nothing of the actual numbers of the possible captors or of their particular positions: we do not know if the presence of the *Kattenturm* was known to any of them. Memory may tell us that some of them at any rate had other things to think of just then, but I suppose we must act as if we knew nothing about it. I lay no stress on the words "on a voyage to Hamburg," although during some part or possibly the whole of August 5 the *Kattenturm* was on a voyage to Messina and was no longer on a voyage to Hamburg. That she would have been "in peril of capture" conveys by implication that she would have had a chance of escape, but here again the plaintiffs give us no information. At any rate, there is no evidence of any peril of capture before August 5. As to the subsequent period, we know

nothing of the ship's speed or equipment, or of the state of her bunkers. I have no doubt that the opinion of the Admiralty was sound, and I should have been a good deal surprised (and, may I say? disappointed) if she had gone on her way and had escaped capture, but when or where that fate would have overtaken her no one can tell. Certainly, no one who realizes the vast size of the ocean and its multitudinous vicissitudes can doubt that she might well have evaded capture for many days, and for all we know she might have been lost by fire or stranding or some cause unconnected with hostilities before ever any enemy hove in sight.

In these circumstances the plaintiffs' argument was rested mainly on (i.) loss by capture or some consequence of hostilities or, (ii.) alternatively, by restraints of princes. The sequence of events under the first head was as follows. Peril of capture outside neutral territorial waters led the captain to the reasonable conclusion that having got safely into Messina he had better stay there. This involved the frustration of the commercial adventure of carrying the cargo to Hamburg and there delivering it under the bills of lading, whereby, in law, the cargo became a loss. On the second head the point was that from the outbreak of war the plaintiffs were by English law restrained from trading with the enemy or doing any acts in furtherance of such trading. Hence, as they could not, durante bello, lawfully pay freight against delivery of the goods in Hamburg, their adventure came to a sudden and untimely end on the outbreak of war and their cargo was forthwith constructively a loss. In neither case does the argument avail, if the loss was one "which is not proximately caused by a peril insured against" (6 Edw. 7, c. 41, s. 55, sub-s. 1).

My Lords, if there is any real distinction to be drawn between a loss by perils insured against and a loss by successfully avoiding them, between a loss by capture and a loss by the fear of it, one might think that it arises in this case. It was self-restraint, not restraint of princes, that hindered the captain from putting to sea. I do not say that he ought to have done otherwise, but the plain fact is that he could do as he liked. On both contentions, if the captain had chosen to go on, the plaintiffs could not have prevented him. He might have picked his own time; he might have weighed his chances at leisure; reasonable delay would not amount to abandonment

H. L. (E.) 1917

BECKER, GRAY AND COMPANY v. LONDON ASSURANCE CORPORATION.

Lord Sumner.

of the voyage. Even an early peace was not wholly beyond the bounds of possibility. Accordingly, the plaintiffs further argued that the captain's election was not the proximate cause of the loss, because to have done otherwise would have been mere folly; that he had no real choice at all; and that British subjects, whom the law forbade to trade with the enemy in futuro by paying freight to this German ship in Hamburg, if ever she arrived, were in law restrained in praesenti, so that a loss of their cargo proximately resulted. The possibility that in the meantime events might occur, which might legalize the act and avert a loss, such as the conclusion of peace or the grant of the Royal licence to pay the freight in order to get the goods, was, they said, of no significance.

My Lords, these contentions have involved some criticisms of the rule of proximate cause, or rather of its true application in insurance cases, which, I venture to think, proceeded from a misapprehension of what this rule really is. There is no mystery about it. Cause and effect are the same for underwriters as for other people. Proximate cause is not a device to avoid the trouble of discovering the real cause or the "common-sense cause," and, though it has been and always should be rigorously applied in insurance cases, it helps the one side no oftener than it helps the other. I believe it to be nothing more nor less than the real meaning of the parties to a contract of insurance. I venture to say so, because eminent judges have sometimes seemed to differ on the point. Lord Denman, speaking of this rule in *De Vaux* v. *Salvador* (1), says: "Such must be understood to be the mutual intention of the parties to such contracts." In *Reischer* v. *Borwick* (2) Lindley L.J. says the same thing. In *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (3), on the other hand, Scrutton L.J. doubts this and considers the rule to be a judge-made rule. I daresay few assured have any distinct view of their own on the point, and might not even see it if it were explained to them; but what they intend contractually does not depend on what they understand individually. If it is implicit in the nature of the bargain, then they intend it in law just as much as if they said it in words. I think that it is so implied. Indemnity

(1) (1836) 4 Ad. & E. 420, 431. (2) [1894] 2 Q. B. 548, 550.
(3) [1917] 1 K. B. 873, 892.

involves it apart from decisions. In effect it is the act of the parties.

I am not aware that any branch of the law of contract attaches importance to remote causes as such, though, where human responsibility is material, it may be necessary to go beyond and behind the mere event which caused the loss or damage. This is why a carrier is liable for losses by perils excepted from his contract to carry and deliver, where the previous default of those for whom he is responsible has brought that peril into injurious operation. His express stipulation for exemption has to be reconciled with his implied undertaking to have the carriage performed with care: *Grill* v. *General Iron Screw Collier Co.* (1), per Willes J.; *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2), per Lord Halsbury. So in marine insurance, where the loss is "attributable to the wilful conduct of the assured" (Marine Insurance Act, 1906, s. 55, sub-s. 2 (*a*)) after the loss by perils insured against has been proved the question still remains whether the assured's wilful conduct caused them to operate. In other cases the insurer "is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew": s. 55, sub-s. 2 (*a*). In a contract of sale or carriage or service the contractor promises to do something for a price, a freight, or a wage, and his liability depends not simply on the question whether something has happened or failed to happen, but whether more remotely it happened or failed to happen owing to his breach of his obligation. In a contract of indemnity (and a contract of suretyship is very analogous) the insurer promises to pay in a certain event and in no other, namely, in case of loss caused in a certain way, and the question is whether the loss was caused in that way, and whether the event occurred, and the remoter causes of this state of things do not become material. If contracts of marine insurance were still regarded, as once they were, as aleatory bargains, this would be plain on the face of them. One need only ask, has the event, on which I put my premium, actually occurred? This is a matter of the meaning of the contract, and not, as seems sometimes to be supposed, of doing the liberal and reasonable thing by a reasonable assured. This is why, as it seems to me, the causa

(1) (1866) L. R. 1 C. P. 600, 612. (2) 12 App. Cas. 518, 524.

H. L. (E.) 1917

BECKER, GRAY AND COMPANY v. LONDON ASSURANCE CORPORATION.

Lord Sumner.

proxima rule is not merely a rule of statute law, but is the meaning of the contract writ large. This is also why the reasonableness of the conduct of the *Kattenturm's* captain and the unreasonableness of suggesting that he might have done otherwise are alike off the point. So long as his action was voluntary it was his action and not that of the captain of a British man-of-war, and the policy insures against the second, but against the first only when it amounts to barratry. There is no case here of duress nor opportunity for saying that his will was not free, except upon grounds too theological to be worth pursuing.

It must be admitted that the terminology of causation in English law is by no means ideal. It would be the better for a little plain English. I think "direct cause" would be a better expression than causa proxima. Logically, the antithesis of proximate cause is not real cause but remote cause. Lord Ellenborough uses causa causans as its equivalent in *Gordon* v. *Rimmington* (1); Abbott C.J. speaks of "immediate" cause in *Walker* v. *Maitland* (2); Lord FitzGerald of "direct and immediate" cause in *Cory* v. *Burr* (3); and my noble and learned friend Lord Loreburn of "direct" cause in *Sanday's Case*. (4) Many similar expressions might be quoted.

Again, it is important that the same word should mean the same thing when used in a mercantile contract, whether that contract be of one description or another. Perils of the seas do not mean one thing in a bill of lading and something else in a policy; restraints of princes do not bear a different interpretation in the one or in the other, but this is not the question. Restraints of princes may excuse non-delivery of cargo under a contract of carriage, and yet not cause a loss of cargo, recoverable under a contract of insurance. It is settled now that mere apprehension that a restraint of princes will come into operation is not the same thing as its existence or available for either purpose. There is also authority for saying (*Nobel's Explosives Co.* v. *Jenkins & Co.* (5)) that if restraint of princes is in being and reasonably likely in the long run to prevent performance of a contract if its further performance is proceeded with, any further performance is forthwith excused, although the direct

(1) (1807) 1 Camp. 123.
(2) (1821) 5 B. & Al. 171.
(3) (1883) 8 App. Cas. 393, 406.
(4) [1916] 1 A. C. 650, 659.
(5) [1896] 2 Q. B. 326.

operation of the restraint has not yet occurred. This is because the contract of carriage, truly construed, so stipulates. It has no bearing upon the question whether a refusal of further performance, though excusable, is the effect of the carrier's exercise of judgment or the effect of the restraint of princes.

Many cases have been cited to your Lordships, but none to the contrary of this. In *Rodocanachi* v. *Elliott* (1) the Germans had prevented all communication between Paris and other places from September 19 down to the date of the writ. Events before September 19, it was held, might give rise to some claim against carriers, but could afford no defence to underwriters if, as was the case, a loss by restraint of princes then occurred and thenceforward continued. The contention that some direct action on the goods was necessary was rejected. There was no question of election or volition on the part of those in charge of the goods. How this case helps the appellants I cannot see. That in *Rodocanachi's Case* (1) the goods were ashore and here were afloat makes no difference. It is said that regard must be had to changes in the mechanism of war, and that cruisers at Gibraltar as truly shut up this jute in Messina in 1914 as the German besiegers shut in the silk at Bercy in 1870. I do not suppose that any rule can be laid down to fix the distance from which an encircling force may be said to besiege a beleaguered city, or from which a hostile force may be said to restrain its enemies. I doubt if changes in the speed of ships or the possibility of signalling by wireless telegraphy or otherwise affect the matter. They help the hunter no more than the quarry. *Miller* v. *Law Accident Insurance Co.* (2) was a case in which a f. c. & s. clause warranted the policy free of certain perils and their consequences. It was held that beyond doubt there was a loss by restraint of princes under the policy apart from the warranty; the only question was whether it was also caused by perils included in the f. c. & s. clause so as to be taken out of the insurance. Stirling L.J. expressly says (3) that the captain did not act voluntarily. The frustration of the adventure was caused by the direct operation of an order, which was an act of State and was backed by the existence of available force though its employment proved to be unnecessary.

(1) L. R. 9 C. P. 518, 522. (2) [1903] 1 K. B. 712.
(3) [1903] 1 K. B. 721.

H. L. (E.) 1917

BECKER, GRAY AND COMPANY v. LONDON ASSURANCE CORPORATION.

Lord Sumner.

I will not review the cases generally or discuss the differences between the English and the United States authorities, but I will refer to a decision of Lord Mansfield, which shows at how early a date a strict construction was applied to causation in policies of insurance. It is *Jones* v. *Schmoll.* (1) The policy was on prime slaves, male and female, to pay for mortality by mutiny exceeding 10 per cent. A mutiny occurred and was suppressed; much blood was shed. Lord Mansfield allowed the value of those slaves who died of wounds or jumped overboard when fired on, as being losses by mutiny, but not the value of "such as, being baffled in their attempts, in despair chose a mode of death by fasting, or died through despondency," because "this is not a mortality by mutiny, but the reverse; for it is by failure of mutiny." The cases down to that of *Kacianoff* v. *China Traders Insurance Co.* (2) all follow one uniform and logical line. If any is illogical it is *Butler* v. *Wildman* (3), for there the dollars went to the bottom, and that by the prompt decision of the master. The adventure of which they formed part was captured, and so they may be said to have been lost to their owners by capture though the Spanish captors never got them. The immediate and actual control, which the captors possessed by armed force over the whole adventure, was equally a capture of the part, and perhaps it is the best way of putting it to say that the captors captured the whole adventure but the captain baulked their profiting by a part of it, though as the owners did not get their dollars back their loss by capture was not adeemed.

My Lords, *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (4) is, I think, distinguishable. There both ship and goods were British, and your Lordships' judgments were based on the fact that the ship abandoned the voyage as the proximate result of the outbreak of war. It was held that no distinction could be drawn for the purpose of causation between the event which called the subject's duty into existence and the subject's obedience to that duty. So high was the obligation that an act done in performance of it did not causally bear the character of a voluntary act or of a new intervening cause. Such a decision does not support the contention that the abandonment of the voyage by a ship,

(1) (1785) 1 T. R. 130, n.
(2) [1914] 3 K. B. 1121.
(3) 3 B. & Al. 398.
(4) [1916] 1 A. C. 650.

which was under no such obligation, is other than the captain's voluntary act or that the obligations of a purely passive cargo owner can divest that voluntary act of the character of a new intervening cause, which it would otherwise bear.

My Lords, if it were otherwise, some remarkable consequences would follow. At 11 P.M. on August 4, 1914, all the world over, every parcel of goods owned by His Majesty's subjects and laden on board of German vessels or of neutral vessels bound for German ports, for freight not prepaid, suddenly became, on this view, a total loss. Both ships and goods might be safe and sound and likely to remain so; cargo owners and shipowners, captains and crews, might all be ignorant of the outbreak of war. The assured, for want of advice that their goods were afloat, might have made no declarations to underwriters under floating policies, and the underwriters might be quite unaware that they were at risk. None the less on that day and at that hour the ocean became suddenly full of constructive total losses securely laden in uninjured ships. British underwriters are entitled to sue and labour for the defence, safeguard, and recovery of the goods insured or to endeavour to salve them for the benefit of whom it may concern, but they, equally with British cargo owners, would be forbidden to pay freight to German shipowners for that purpose. Indeed, unless by British capture they could come by their own again, the cargo owners would have to let their goods remain in enemy hands and that at the expense of British underwriters. Where the ships belong to His Majesty's subjects, such is the law: your Lordships have so decided; but I should be loth to carry that decision beyond its true ratio decidendi. The language of my noble and learned friends, Lord Loreburn (1), Lord Atkinson (2), Lord Parmoor (3), and Lord Wrenbury (4), shows that the illegality of any further prosecution of the voyage, both ship and master being British, was the ground of the decision.

In truth, in the present case, the outbreak of war imposed no practical disability on the British cargo owners then and there beyond what already existed. Their obligations as British subjects had nothing to do with the actual termination of this adventure. The declaration of war, at the time when it was made, only

(1) [1916] 1 A. C. 658.
(2) Ibid. 664, 665.
(3) Ibid. 670.
(4) Ibid. 672.

H. L. (E.) 1917

BECKER, GRAY AND COMPANY v. LONDON ASSURANCE CORPORATION.

Lord Sumner.

prohibited acts which the plaintiffs were in any case already powerless to perform. If it frustrated the adventure, it did so eventually, but at the same time, though for different reasons and in a different way, the captain of the *Kattenturm* frustrated it forthwith. If he had continued the adventure and had proceeded, the cargo owners might have sustained a recoverable loss by other perils insured against without any illegality on their part.

The appellants' other contentions may be shortly disposed of. This is not a case in which the subject-matter of the insurance was abandoned " on account of its actual total loss appearing to be unavoidable " within s. 60. Neither is it a case of loss by any other peril " that shall come to the hurt " of the cargo similar to enemies, as in *The Knight of St. Michael.* (1) It is said that there was a direct loss by " enemies " when the German captain refused to deliver to the plaintiffs' representative at Messina except on payment of freight, which he had not earned, and of charges, which were not due. To be sure he said that he did so by order of his Government, but I do not see why we should believe him. Bailhache J. did not, and it does not appear what motive he had for speaking the truth. Committed in neutral waters his act was a mere civil wrong, and not one falling within the cause of loss called " enemies " in the policy. For these reasons I think that the appeal fails and should be dismissed with costs.

EARL LOREBURN. My Lords, I am authorized to say that my noble and learned friend Lord Wrenbury has come to the same conclusion.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, October 29, 1917.

Solicitors for appellants : *Rehder & Higgs.*
Solicitors for respondents : *Waltons & Co.*

(1) [1898] P. 30.

[IN THE HOUSE OF LORDS.]

METROPOLITAN WATER BOARD . . . APPELLANTS; AND DICK, KERR AND COMPANY, LIMITED . RESPONDENTS.

H. L. (E.)* 1917 Nov. 26.

Contract—Performance—Impossibility—Vis Major—Stoppage of Work by Ministry of Munitions—Suspension or Termination.

By a contract made in July, 1914, a firm of contractors contracted with a Water Board to construct a reservoir to be completed within six years, subject to a proviso that if by reason of (inter alia) any difficulties, impediments, or obstructions whatsoever and howsoever occasioned the contractors should, in the opinion of the engineer, have been unduly delayed or impeded in the completion of the contract it should be lawful for the engineer to grant an extension of the time for completion. By a notice given by the Ministry of Munitions in February, 1916, in exercise of the powers conferred by the Defence of the Realm Acts and Regulations, the contractors were required to cease work on their contract and they ceased work accordingly. The contractors claimed that the effect of the notice was to put an end to the contract:—

Held, that the provision for extending the time did not apply to the prohibition of the Ministry; that the interruption created by the prohibition was of such a character and duration as to make the contract when resumed a different contract from the contract when broken off, and that the contract had ceased to be operative.

Tamplin Steamship Co. v. *Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397 distinguished.

Hadley v. *Clarke* (1799) 8 T. R. 259 disapproved by Lord Finlay L.C.

Decision of the Court of Appeal [1917] 2 K. B. 1 affirmed.

APPEAL from a decision of the Court of Appeal reversing a decision of Bray J. (1)

The question raised by the appeal was whether a contract in writing dated July 24, 1914 (as modified by a supplemental contract dated May 10, 1915), between the appellants and the respondents for the construction of a reservoir at Littleton, in the county of

* *Present:* LORD FINLAY L.C., LORD DUNEDIN, LORD ATKINSON, and LORD PARMOOR.

(1) [1917] 2 K. B. 1.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Middlesex, was terminated by a notice given by the Ministry of Munitions under the powers of the Defence of the Realm Acts and Regulations, whereby the respondents were required to cease work under the contract, or was still in existence as a binding contract.

The notice was given by a letter, dated February 21, 1916, written by the Secretary to the Ministry of Munitions to the respondents. The letter was as follows :—

"I am directed by the Minister of Munitions to inform you that he has found it necessary to take steps to restrict the work which you are carrying out at Staines for the Metropolitan Water Board and the employment of workmen there, and to remove the plant therefrom with a view to increasing the production of munitions elsewhere. I am, therefore, to inform you that in exercise of the powers conferred upon him by the Defence of the Realm (Consolidation) Act, 1914, the Defence of the Realm Amendment (No. 2) Act, 1915, the Defence of the Realm (Consolidation) Regulations, 1914, and the Ministry of Munitions Order, 1915, the Minister hereby requires you forthwith to cease work on your contract for the Metropolitan Water Board.

"I am further to require you to comply with such instructions with regard to your plant and the labour at your disposal as may be conveyed to you on the Minister's behalf by Mr. John Hunter, Director of Factory Construction in the Ministry of Munitions."

On May 19, 1916, the appellants commenced this action against the respondents claiming (inter alia) that the contract of July 24, 1914, as modified by the supplemental contract of May 10, 1915, was still binding on the parties and had not been determined by the notice of February 21, 1916.

The defence was that by reason of this notice the further performance of the contract had become impossible and illegal and that both parties were released from all further liability thereunder.

The facts and the material portions of the contract of July 24, 1914, are fully set out in the judgment of the Lord Chancellor.

Bray J. held that the delay created by the stoppage of work was not so great as to render the completion of the contract physically impossible or commercially impracticable, and, further, that the prohibition of the Ministry was covered by the clause in the conditions of the contract enabling the engineer to grant an extension of

time. He therefore made a declaration that the contract had not been abrogated or determined.

The Court of Appeal (the Master of the Rolls, Warrington L.J. and Scrutton L.J.) reversed the decision of Bray J. and held that the contract was at an end.

1917. Oct. 23, 25, 26. *P. O. Lawrence, K.C.* (with him *Holman Gregory, K.C.*, and *Joshua Goodland*), for the appellants. The action of the Minister of Munitions has not put an end to this contract inasmuch as it has neither frustrated the object of the contract nor made the completion thereof physically impossible or commercially impracticable. It has only suspended the carrying on of the works under the contract, and such suspension is covered by the clause empowering the engineer to grant an extension of the time for completion. In determining whether the contractors are relieved from the further performance of this contract a contract for the execution of public works of a permanent character stands on a different footing from an ordinary commercial contract or from a contract for the building of a dwelling-house for a private person, who may require to inhabit it immediately. Moreover, this contract at the time of suspension had been partly performed. This case is covered by *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) and falls directly within the principle of law there propounded by Earl Loreburn. The general rule is that impossibility which arises subsequently to the contract does not excuse from performance: *Paradine* v. *Jane* (2); *Atkinson* v. *Ritchie* (3); *Barker* v. *Hodgson* (4); *Spence* v. *Chodwick.* (5) In the last cited case Wightman J. states the principle as follows: "The defendant here was prevented by inevitable necessity from performing his contract. But he might have provided in his contract against the consequences of such a contingency; he has not done so, and is without excuse." The exceptions to this general rule fall under two heads: (1.) Where the impossibility does not depend upon any question of illegality; (2.) where the impossibility arises from some change in the law subsequent to the contract rendering its further

(1) [1916] 2 A. C. 397.
(2) (1647) Aleyn, 26.
(3) (1809) 10 East, 530.
(4) (1814) 3 M. & S. 267.
(5) (1847) 10 Q. B. 517, 530.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

performance illegal. The first class may be subdivided as follows :— (*a*) Where the continued existence of some specified thing is essential to the performance of the contract and the destruction or removal of that thing is caused by vis major. In that case the parties are excused from performance: *Taylor* v. *Caldwell* (1); *Appleby* v. *Myers*. (2) *Krell* v. *Henry* (3) (the Coronation case) is an extension of the principle laid down in *Taylor* v. *Caldwell* (1); but compare with that the very similar case of *Herne Bay Steam Boat Co.* v. *Hutton* (4) (the Naval Review case), where the happening of the Naval Review was declared to be not the sole basis of the contract, so that there was no total destruction of the subject-matter. (*b*) Cases relating to marine adventures where the adventure is frustrated by a delay which has occurred without the fault of either party: *Jackson* v. *Union Marine Insurance Co.* (5); *Geipel* v. *Smith* (6); *Scottish Navigation Co.* v. *W. A. Souter & Co.* (7) (*c*) Where the contract depends upon the rendering of personal services which no deputy can perform and the person to perform the services has become disabled by ill-health: *Poussard* v. *Spiers & Pond*. (8) In considering the second class, which turns upon the question of illegality, it is essential to distinguish between (*a*) cases where a permanent prohibition is imposed by Parliament and (*b*) cases where the prohibition is temporary only. Examples of (*a*) are *Baily* v. *De Crespigny* (9) and *Brewster* v. *Kitchell* (10), where it is said that Parliament repeals the covenant. Under head (*b*) fall the cases of trading with the enemy, e.g., *Esposito* v. *Bowden* (11) and *Distington Hematite Iron Co.* v. *Possehl & Co.* (12) Trading with the enemy is illegal at common law, and a declaration of war imports an absolute interdiction of all commercial intercourse or correspondence with the enemy except under licence from the Crown, and any contract running at the date of such declaration is absolutely dissolved. Those cases fall under a distinct category. But the temporary illegality may arise from a change in the law of our own country

(1) (1863) 3 B. & S. 826.
(2) (1867) L. R. 2 C. P. 651.
(3) [1903] 2 K. B. 740.
(4) [1903] 2 K. B. 683.
(5) (1874) L. R. 10 C. P. 125.
(6) (1872) L. R. 7 Q. B. 404.
(7) [1917] 1 K. B. 222.
(8) (1876) 1 Q. B. D. 410.
(9) (1869) L. R. 4 Q. B. 180.
(10) (1697) 1 Salk. 193.
(11) (1857) 7 E. & B. 763.
(12) [1916] 1 K. B. 811.

which results in the suspension or delay in the execution of a contract. There the question to be determined is whether that suspension or delay is such as to frustrate the adventure or the object of the parties in a commercial sense. If not, the contract is not dissolved. Cases of this description in which the contract has been held to be not determined are *Hadley* v. *Clarke* (1), *Beale* v. *Thompson* (2), *Andrew Millar & Co.* v. *Taylor & Co.* (3), and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (4) This being a case of temporary illegality, the test is whether this temporary interference with the freedom of action of the parties is such as to make the contract a different contract if it has to be performed after the embargo has been taken off, not whether it has inflicted loss or hardship on the parties. A contract such as the present is not abrogated by putting an embargo on its execution even though that compulsion lasts for a considerable time.

Upjohn, K.C., Sir Ernest Pollock, K.C., Hon. F. Russell, K.C., and *Douglas Hogg, K.C.*, for the respondents, were not called upon.

The House took time for consideration.

Nov. 26. LORD FINLAY L.C. My Lords, the question in this case is whether a contract for the construction of reservoirs and waterworks between the Metropolitan Water Board, the appellants, and Messrs. Dick, Kerr & Co., Limited, the respondents, can be treated by the respondents as at an end in consequence of an Order of the Minister of Munitions that work under the contract should cease.

The action was begun by the Metropolitan Water Board by writ dated May 19, 1916, against the contractors, and the statement of claim asked for a declaration that the contract is still in existence as a binding contract and had not been determined. The defence alleges that notice from the Ministry of Munitions, dated February 21, 1916, was given in exercise of the powers conferred by the Defence of the Realm Acts and the Regulations and Orders made thereunder, and that the notice required the contractors to cease work on their contract and that they ceased work accordingly. The defence went on to allege that thereby the contract ceased to be binding.

(1) 8 T. R. 259.
(2) (1804) 4 East, 546 ; (1813) 1 Dow, 299.
(3) [1916] 1 K. B. 402, 410.
(4) [1916] 2 A. C. 397.

H. L. (E.)
1917
METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.
Lord Finlay L.C.

The case was tried by Bray J., who gave judgment for the Metropolitan Water Board, holding that the notice should have been dealt with under the terms of the contract by an extension of time for the completion of the contract, and that the contract was still in existence. On appeal this decision was reversed by the Court of Appeal, consisting of the Master of the Rolls, Warrington L.J., and Scrutton L.J. The appellants by the present appeal ask that the decision of Bray J. should be restored.

The contract was one for the construction of extensive reservoirs and other works near Staines, the respondents' tender being accepted by the appellants on July 24, 1914. The decision of Bray J. in favour of the appellants was rested by him upon the 32nd condition of the contract, which is in the following terms :—

" The contractor shall complete and deliver up to the Board the whole of the works necessary to allow the Western reservoir to be filled and brought into use and shall complete the removal of all such temporary works, plant and surplus material as may in the opinion of the engineer be necessary to enable this to be done, within a period of four years from the date of the engineer's written order to commence the works and the contractor shall complete and deliver up to the Board the whole of the works comprised in this contract and shall complete the removal of all temporary works. plant and surplus material within a period of six years from the date of the engineer's written order to commence the works. The whole of the works to be delivered up complete in every respect, in a clean and perfect condition. Provided always that if by reason of any additional works or enlargements of the works (which additions or enlargements the engineer is hereby authorised to make), or for any other just cause arising with the Board or with the engineer, or in consequence of any unusual inclemency of the weather, or general or local strikes, or combination of workmen, or for want or deficiency of any orders, drawings or directions, or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences, whatsoever and howsoever occasioned, the contractor shall, in the opinion of the engineer (whose decision shall be final), have been unduly delayed or impeded in the completion of this contract, it shall be lawful for the engineer, if he shall so think fit, to grant from time to time, and at any time or times by writing under his hand, such

extension of time either prospectively or retrospectively, and to assign such other day or days for or as for completion, as to him may seem reasonable, without thereby prejudicing or in any manner affecting the validity of the contract, or the adequacy of the contract price, or the adequacy of the sums or prices mentioned in the third schedule; and any and every such extension of time shall be deemed to be in full compensation and satisfaction for, and in respect of, any and every actual or probable loss or injury sustained or sustainable by the contractor in the premises, and shall in like manner exonerate him from any claim or demand on the part of the Board, for and in respect of the delay occasioned by the cause or causes in respect of which any and every such extension of time shall have been granted, but no further or otherwise, nor for or in respect of any delay continued beyond the time mentioned in such writing or writings respectively."

Bray J. held that this condition applied, and that the prohibition by the Minister of Munitions should have been dealt with by an extension of time under it. The Court of Appeal, on the other hand, held that the prohibition issued in consequence of the war rendered the prosecution of the works illegal for a period of indefinite duration, and must be treated as having put an end to the contract.

The date of commencement of the works was fixed by the engineer as being August 16, 1914. The war broke out on August 4, 1914, but the works under the contract proceeded. On May 10, 1915, the nature of the works was varied and the amount of payment increased by a supplemental contract of that date. In spite of difficulties occasioned by scarcity of labour and the character of the ground on which the reservoir was to be constructed the works went on and a substantial amount of work, as appears from plan 20A, had been done, when, on February 21, 1916, the work was stopped by the Minister of Munitions and the plant sold under his direction. The prohibition has not been withdrawn up to the present time.

In my opinion the decision of the Court of Appeal was right.

It is admitted that the prosecution of the works became illegal in consequence of the action of the Minister of Munitions. It became illegal on February 21, 1916, and remains illegal at the present time. This is not a case of a short and temporary stoppage, but of a prohibition in consequence of war, which has already been in

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Lord Finlay L.C.

force for the greater part of two years, and will, according to all appearances, last as long as the war itself, as it was the result of the necessity of preventing the diversion to civil purposes of labour and material required for purposes immediately connected with the war. Condition 32 provides for cases in which the contractor has, in the opinion of the engineer, been unduly delayed or impeded in the completion of his contract by any of the causes therein enumerated or by any other causes, so that an extension of time was reasonable. Condition 32 does not cover the case in which the interruption is of such a character and duration that it vitally and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made.

It was not disputed, as I understand the argument for the appellants, that in the case of a commercial contract, as for the sale of goods or agency, such a prohibition would have brought it to an end. It was sought to distinguish the present case on the ground that the contract was for the construction of works of a permanent character, which would last for a very long time, and that a delay, even of years, might be disregarded. This contention ignores the fact that, though the works when constructed may last for centuries, the process of construction was to last for six years only. It is obvious that the whole character of such a contract for construction may be revolutionized by indefinite delay, such as that which has occurred in the present case, in consequence of the prohibition.

The House is greatly obliged to Mr. P. O. Lawrence for his very able and exhaustive analysis of the authorities. I do not think it necessary to examine these authorities in detail, as the principle applicable in such cases has been often laid down and is well established. I will only refer to the judgment of the Queen's Bench delivered by Hannen J. in *Baily* v. *De Crespigny* (1), especially at pp. 185-186, and to the judgment of Rowlatt J. in *Distington Hematite Iron Co.* v. *Possehl & Co.* (2) The contract in the present case was for the completion and handing over of these works within six years from August 16, 1914. The effect of the prohibition may be that the works cannot be resumed until, at all events, the greater part of the six years has expired, and by that time all con-

(1) L. R. 4 Q. B. 180. (2) [1916] 1 K. B. 811, 814.

ditions as regards labour and materials may be absolutely different. This, in the words of Rowlatt J., would be "not to maintain the original contract, but to substitute a different contract for it." The difference of opinion in *Horlock* v. *Beal* (1) and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2) was not so much upon principle as in the application of the principle to the particular cases. The case of *Hadley* v. *Clarke* (3) cannot be relied upon as an authority.

In my opinion this appeal should be dismissed with costs.

LORD DUNEDIN. My Lords, I concur. The general law on the subject of what supervening event will excuse the performance of a contract has been so recently dealt with in elaborate opinions in your Lordships' House in the cases of *Horlock* (1) and *Tamplin* (2) that I think it would be useless again to review the past authorities in any detail. It is true that in *Tamplin's Case* (2) there was a narrow majority in favour of the judgment pronounced, but after a careful consideration of the opinions delivered I have come to the conclusion that there was no difference in the opinions of the majority and of the minority in the principles of law applicable to such cases, those principles having already been expressed in *Horlock's Case* (1), but that the only difference lay in their application to the facts of the case then under consideration.

My Lords, I shall content myself with one quotation from the opinion of one of the majority. Earl Loreburn points out that in all cases it must be said that there is an implied term of the contract which excuses the party, in the circumstances, from performing the contract, and then continues (4): "It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted." He further points out that the particular ratio decidendi in various cases is sometimes that performance has become impossible, and that the party concerned did not promise to perform an impossibility; sometimes it is put that the parties contemplated a certain state of things which fell out otherwise.

(1) [1916] 1 A. C. 486.
(2) [1916] 2 A. C. 397.
(3) 8 T. R. 259.
(4) [1916] 2 A. C. 404.

H. L. (E.)
1917
METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.
Lord Dunedin.

Now a subsequent law may be the cause of an impossibility, whether by actually forbidding an act undertaken in the contract—which is the direct meaning of illegality—or whether by means of taking away something from the control of the party, as to which thing he has contracted to do or not to do something else. An example of the latter class may be found in the case of *Baily* v. *De Crespigny*. (1)

But to make what I may call a clean case of illegality the illegality must be permanent. The appellants here say that the illegality of working on the reservoir is only temporary, and will some day be withdrawn, and they seek to liken it to the interruption of the contract of affreightment in *Tamplin's Case* (2), which they say was held by the majority to be only temporary, or at least not proved to be permanent. I shall revert to *Tamplin's Case* (2), but I should like first to point out that I think the appellants rather mistake the effect of the force of legislation in the present case. The order pronounced under the Defence of the Realm Act not only debarred the respondents from proceeding with the contract, but also compulsorily dispersed and sold the plant. It is admitted that an interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted. But quite apart from mere delay it seems to me that the action as to the plant prevents this contract ever being the same as it was. Express the effect by a clause. If the Water Board had, when the contract was being settled, proposed a clause which allowed them at any time during the contract to take and sell off the whole plant, to interrupt the work for a period no longer than that for which the work has actually been interrupted, and then bound the contractor to furnish himself with new plant and recommence the work, does any one suppose that Dick, Kerr & Co. or any other contractor would have accepted such a clause? And the reason why they would not have accepted it would have been that the contract when resumed would be a contract under different conditions from those which existed when the contract was begun. It may be said that it is possible that plant may be cheaper after the war. But no one knows, and the contractor is not bound to submit to an aleatory bargain to which he has not agreed. It will also be kept in mind

(1) L. R. 4 Q. B. 180. (2) [1916] 2 A. C. 397.

that the contract was a measure and value contract. The difference between the new contract and the old is quite as great as the difference between the two voyages in the case of *Jackson* v. *Union Marine Insurance Co.* (1)

I return to *Tamplin's Case* (2) to show that the views of the majority (for obviously I need not deal with those of the minority) were based upon circumstances which find no proper analogy in the circumstances here. In the first place the person who wanted the contract declared at an end was the owner. The charterer, notwithstanding what had happened, was content to go on paying the hire, and to refrain, during the period while the Government were in possession of the ship, from demanding any services from the owners. Under the contract, as Lord Parker put it (3), "The owners are not concerned in the charterers doing any specific thing beyond the payment of freight as it becomes due." That payment the charterers, as I have already said, were ready to make. The reason, no doubt, was that they had already got, or thought they would get, from the Government a larger sum of money than they had to pay to the owners. So that one view that I think ran through the opinions of the majority was this: No one was hurt by the continuance of the charter, and if the Government relinquished the ship there was no reason why the charter should not be effective for the remaining period of its duration, which might be considerable. But suppose the facts had been slightly different. Suppose the Government had taken the ship, and had said they would pay nothing—a proceeding within their powers—and then suppose that the owner had sued the charterer for the hire during the period while the Government kept the ship. What then? I may be wrong, but it seems to me it would have fallen within the lines of *Horlock* v. *Beal.* (4)

There was another ground of judgment in *Tamplin's Case* (2), and as I read it this was the real ground of Lord Parker's opinion, in which the Lord Chancellor concurred. There was a special exemption clause which contained, inter alia, "restraint of princes." The facts fell within that description, and then, said Lord Parker, you cannot have an implied condition which will contradict an

(1) L. R. 10 C. P. 125.
(2) [1916] 2 A. C. 397.
(3) [1916] 2 A. C. 426.
(4) [1916] 1 A. C. 486.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Lord Dunedin.

expressed condition. The same argument was attempted here. The appellants appealed to s. 32, which has been already quoted. It is enough for me to say that the words " or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes or differences whatsoever and howsoever occasioned " only deal, in my view, with more or less temporary difficulties, and do not cover a set of occurrences which would make the contract when resumed a really different contract from the contract when broken off. The argument from *Tamplin's Case* (1) therefore, in my opinion, fails in application.

On the whole matter I think that the action of the Government, which is forced on the contractor as a vis major, has by its consequences made the contract, if resumed, a work under different conditions from those of the work when interrupted. I have already pointed out the effect as to the plant, and, the contract being a measure and value contract, the whole range of prices might be different. It would in my judgment amount, if resumed, to a new contract; and as the respondents are only bound to carry out the old contract and cannot do so owing to supervenient legislation, they are entitled to succeed in their defence to this action.

LORD ATKINSON. My Lords, I concur. The facts have already been fully stated, and I abstain from repeating them. Mr. Lawrence, in opening the appeal, manfully struggled to bring this case within the decision, or supposed decision, of this House in the recent case of *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) Only two judgments were delivered in that case by the noble Lords who composed the majority, namely, that of Lord Loreburn and that of Lord Parker, with which latter the then Lord Chancellor concurred. It is, I think, desirable, having regard to the arguments addressed to the House on this appeal, to endeavour to ascertain what were the precise points decided in that case, and then to see how far the principles laid down are applicable to the present case. Lord Loreburn leaves one in no doubt as to what were the grounds of his decision.

At p. 403 of the report he says that an examination of the authorities confirmed him in the view that where our Courts have held

(1) [1916] 2 A. C. 397.

innocent contracting parties absolved from further performance of their promises it has been on the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it was put that the performance had become impossible and that the party concerned did not promise to perform an impossibility; sometimes that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it was said that there was an implied condition in the contract which operated to release the parties from performing it; and in all of them, I think, this last-named was, at bottom, the principle upon which the Courts proceeded. It is in my opinion the true principle. It was left to the Court not to absolve but to infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was the foundation upon which the parties contracted.

On p. 404 Lord Loreburn proceeded to say that where the question arose in regard to commercial contracts, as happened in the three cases he named, the principle was the same, and the language used as to "frustration of the adventure" merely adapted it to the cases in hand; that in these three cases it was held, to use the language of Lord Blackburn, "that a delay in carrying out a charterparty, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end"; that this, however, was only another way of saying that from the nature of the contract it could not be supposed the parties, as reasonable men, intended it to be binding on them under such unreasonable conditions. So far, I think, there is no substantial conflict between this judgment and the judgments of the minority as to the principle of law applicable to the case. Lord Loreburn then examines the facts, and on the following page says that if the interruption could be pronounced, in the language of Lord Blackburn, so great and long as to make it unreasonable to require the parties to go on, then it would be different. Both of them must have contracted on the footing that such an interruption as that would not take place, and that he would imply a condition to that effect, but that, taking into account all that had happened, he could not infer that the interrup-

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY

Lord Atkinson.

tion either had been or would be in that case such as made it unreasonable to require the parties to go on. He added that there might be many months during which the ship would be available for commercial purposes before the five years expired. At the bottom of the page and the top of the succeeding page he says the question to be answered is: "Ought we to imply a condition in the contract that an interruption such as this shall excuse the parties from further performance of it? I think not. I think they took their chance of lesser interruptions, and the condition I should imply goes no further than that they should be excused if substantially the whole contract became impossible of performance, or in other words impracticable, by some cause for which neither was responsible." It will be observed that Lord Loreburn does not say or, I think, suggest that there is any difficulty in applying the principle he lays down to a time charter, while the only reference he apparently makes to the clause in the charterparty referring to the "restraint of princes" is contained in the expression "I think they took their chance of lesser interruptions."

Lord Parker does not, I think, in his judgment differ as to the general principle. At p. 422 he says: "This principle is one of contract law, depending on some term or condition to be implied in the contract itself and not something entirely dehors the contract which brings the contract to an end. It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions." At p. 425, however, he quotes the 20th condition of the charterparty, referring to restraint of princes, and says at the bottom of p. 426 that he has no doubt that the requisitioning of the steamship by His Majesty's Government was "a restraint of princes" within the meaning of that condition; and proceeds: "The parties therefore have expressly contracted that for the period during which by reason of such restraint the owners are unable to keep the ship at the disposition of the charterers the freight is to continue payable, and the owners are to be free from liability. This period may be long or short. It may be certain or indefinite. It may occur towards the beginning or towards the end of the term of the charterparty. The result is to be the same, unless indeed the circumstances are such that the ship can be said to be

lost within the meaning of condition 19." He added: "Moreover" (and it seemed to him the vital point), "the charterparty does not contemplate any definite adventure or object to be performed or carried out within reasonable limits of time so as to justify a distinction being drawn between delays which may render such adventure impossible and delays which may not."

Lord Parker then proceeds (1) to say that it was difficult, if not impossible, to frame any condition by virtue of which the contract of the parties would be at an end without contradicting the express provisions of the contract and defeating the intention of the parties as disclosed by those provisions. He said the nearest he could get to it would be by a proviso to condition 20, which he sketched, but that even this contradicted the provisions of condition 20. He then winds up by saying that having regard to the difficulty of framing any condition which could be implied without contradicting the express terms of the contract which is a time charter only, and does not contemplate any commercial adventure in which both parties are interested, or indeed any commercial adventure at all, and finally, having regard to the fact that the condition which is sought to be implied is a condition defeating a contract already part performed and not a condition precedent to a contract which remains executory purely, he comes to the conclusion that the decision of the Court of Appeal was right. In reference to this last point it is only right to point out that in *Horlock* v. *Beal* (2) and in several cases therein cited the contract held to be at an end had been in part performed. This is the only judgment given in the case by which such vital effect is given to the provision of condition 20. I hardly think, however, that, great undoubtedly as is the weight which must always be attached to any opinion expressed by Lord Parker, it can be assumed that this House decided that the provisions of the 20th condition of the charterparty had the effect which he attributed to them. Even, however, if they had that effect, the question remains, can the provisions of condition 32 of the first agreement in the present case have a similar effect? Have the respondents contracted themselves out of all claim to be absolved from

(1) [1916] 2 A. C. 427. (2) [1916] 1 A. C. 486.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Lord Atkinson.

the performance of their promises, no matter how prolonged the enforced suspension of their work may be, or how absolute the deprivation of their freedom of action, and have they limited themselves to the relief the engineer may, under that condition, accord to them in the shape of extending the time for completion of the work? If so, Lord Parker's judgment might possibly apply, as the express provisions of the contract would then be inconsistent with the terms of the implied condition under which they would be relieved from the further performance of their promises. As I understood Mr. Lawrence, he contended that condition No. 32 did contain a provision covering the action of the Ministry of Munitions. It is to be found, he said, in the proviso following the clause requiring that the works are to be completed and delivered up in clean and perfect condition within six years from the date of the engineer's order to commence them. In this clause it is provided that if, in the opinion of the engineer (which is to be final), the respondents should be unduly delayed or impeded in the completion of the contract by any one of a great number of things previously enumerated, the engineer might at any time or times extend the time, and fix such other day or days for completion as to him should seem reasonable without thereby prejudicing or in any way affecting the validity of the contract or the adequacy of the contract prices, &c. The several things enumerated which may cause this undue delay are additional or enlarged works or any just cause arising with the Board or engineer, bad weather, strikes, want or deficiency of orders, drawings or directions, or any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences whatsoever or howsoever caused. Mr. Lawrence contended that the word "difficulties" used in this condition in a contract made on July 24, 1914, covered the action of the Ministry of Munitions. It is obvious that as the attempt to continue working in defiance of this order of the Ministry would be a crime for which the respondents and the members of their staff employed on the works could be imprisoned, the order did impose difficulties in the respondents' way; but it is only necessary to read the clause to see that difficulties arising from the exercise by the Executive of their most unprecedented and arbitrary powers, not conferred on them till long after the date of the contract, could never have been within the contemplation of the parties at the time

they entered into the contract. The difficulties they referred to must have been difficulties arising in the execution of the works somewhat analogous in kind and character to those things they had enumerated, or which at least the engineer might adjudge had unduly delayed or impeded the completion of the contract. It would be absurd to leave it in the power of the engineer to decide that the removal of all the plant, coupled with the making it a crime to proceed with the works, had not unduly delayed the completion of the contract. Yet if the argument be sound that would be in his power. I am clearly of opinion, therefore, that the provisions of this condition do not apply to the action of the Ministry of Munitions or its result, and that the case must be decided as if it did not form any part in the contract.

My Lords, that being so, I have no doubt that it was the manifest intention of both parties to this contract that they should, without any default on their respective parts, be each left substantially free to exercise the rights and discharge the obligations the contract conferred and imposed upon them; that the continued existence of that freedom of action till the contract was performed must have been in their contemplation as the very foundation of it at the time they entered into it; and that to give effect to that intention a condition should by implication be read into the contract to the effect that the obligation to perform it should cease if by vis major, such as the action of the Executive Government of this country, they should be deprived to a very substantial extent of their freedom of action. Well, the respondents have been for a considerable time deprived of all freedom of action. The Executive Government, acting no doubt legally and within its powers, has for objects of State made it illegal and impossible for the respondents to do that which they promised to do. No one can tell how long it may continue to be invaded. In my opinion they are entitled to be absolved from the further performance of that promise. In addition it may well be that in this case, just as in that of *Jackson* v. *Union Marine Insurance Co.* (1), the delay may render the adventure the respondents embarked upon as different from what it would have been if completed without interruption, as was the summer voyage which the parties contemplated in that case from the winter voyage which the

(1) L. R. 10 C. P. 125.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

delay would have necessitated. The conditions after the war may be entirely changed and the work already done may be deteriorated by the delay. I think the decision of the Court of Appeal was right, therefore, and should be upheld, and this appeal be dismissed, with costs here and below.

LORD PARMOOR. My Lords, on July 24, 1914, the appellants and respondents entered into a contract for the construction of two reservoirs at Littleton, in the county of Middlesex. The contract involved the construction of large works, and the contract price for works comprised under the said contract was 673,811*l.* 15*s.* The contract was, however, framed on the principle of measure and value, and this sum only indicated the probable approximate cost. The original contract was modified by a supplemental contract on May 10, 1915. There were alterations in the works to be executed and the prices to be paid, but in all other material respects the same conditions applied in both contracts. The supplemental contract contained a proviso that "except as hereby is expressly provided nothing herein contained shall be deemed to alter, prejudice, or affect any of the terms or conditions of the principal agreement."

The respondents proceeded with the work under both contracts until February 21, 1916. On that date a letter was sent to both parties that the Minister of Munitions had found it necessary to give directions for the cessation of the work. In accordance with this letter the work ceased to be carried on, and subsequently the plant employed was largely removed to Government works on the instruction of the Ministry of Munitions. The contention of the appellants is that the Order of the Ministry did not affect the validity of the contract, and on May 19, 1916, they issued a writ claiming a declaration that the contract was still in existence as a binding contract between the parties. At the trial Bray J., holding that the delays and impediments created by the stoppage of the work were not so great as to render the completion of the contract physically impossible or commercially impracticable, and that the Order of the Ministry fell within the proviso of clause 32 of the conditions of the contract, made a declaration that the contract had not been abrogated or determined, and further granted an injunction restraining

the respondents from removing any of the plant, tools, or materials on the site at the date of the said judgment, or from receiving the proceeds either of such as had been removed, or which might thereafter be removed. This Order was discharged in the Court of Appeal, without prejudice to any question between the parties not raised by the pleadings in this action. It is against this Order that the appeal has been brought to your Lordships' House.

The question of principle involved in the consideration of this Appeal has been recently considered in your Lordships' House in the cases of *Horlock* v. *Beal* (1) and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2) The difficulty arises not so much in the statement of principle as in its application to particular cases. It is under this head that some difference of opinion has arisen. The question is one of contract law, and the decision in each case depends on the ascertainment of the true meaning of the bargain between the parties. If the parties have provided by apt words in the contract for their mutual rights or liabilities, in the event of the contract works being stopped, or indefinitely hindered by the operation of a subsequent law and such provision is not contrary to public policy, then it would be the duty of any Court to give effect to such provision. If, on the other hand, the contract contains no provision for such a contingency as the interference of the Legislature, then the Court must determine whether this contingency is of such a character that it can reasonably be implied to have been in thecontemplation of the parties at the date when the contract was made. Care must always be taken not to imply a condition which would be inconsistent with the expressed intention of the parties. In the present case the judgment of Bray J. largely depends on his opinion that the parties expressly provided for the contingency, which has occurred, under section 32 of the original contract. I am unable to assent to this construction. The contract is one substantially in common form, where works of this character are to be carried out in a fixed time, subject to payment on the basis of measure and value. It is usual in such a contract to authorize the engineer, at his discretion, in certain events to grant by writing under his hand such extension of time as to him may seem reasonable, without thereby prejudicing, or in any way affecting the validity of

(1) [1916] 1 A. C. 486. (2) [1916] 2 A. C. 397.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Lord Parmoor.

the contract. In the present contract the engineer has authority to give extension of time if, in his opinion, the completion of the contract has been unduly delayed or impeded "by reason of any additional works or enlargements of the works (which additions or enlargements the engineer is hereby authorized to make), or for any other just cause arising with the Board or with the engineer, or in consequence of any unusual inclemency of the weather, or general or local strikes or combination of workmen, or for want or deficiency of any orders, drawings, or directions, or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences, whatsoever or howsoever occasioned." This language is no doubt wide, and the general words may be large enough to include the contingency of legislative interference stopping the works or postponing their erection for an indefinite time. I think, however, that the language was used alio intuitu, and that it is not reasonable to hold that it had any reference to such a contingency, or that such a contingency was in the contemplation of the parties when framing the terms of the section. A mere extension of time at the discretion of the engineer is not in any sense an appropriate remedy for the contingency which has occurred. In my opinion neither party intended to leave the decision as to what should be done in such a contingency to the discretion of the engineer, under an ordinary extension of time clause in a works contract.

It is necessary, therefore, for your Lordships to consider what is to be implied as the intention of the parties to the bargain, having regard to the terms of the contract and the nature of the work to which the contract applies. It is not necessary to go through the terms of the contract in any detail. No special provision was called to the attention of your Lordships which would in principle differentiate this contract from an ordinary measure and value contract, in which a definite time is fixed for completion, subject to a clause allowing extension of time in certain events, at the discretion of the engineer. What is the real meaning and purport of such a contract? It is that works shall be carried out at prices fixed with reference to the then outlook for cost of labour, plant, and material, spread over a defined limit of time, which could not fail to affect materially the figures inserted by any contractor in sending in his tender. The same considerations

would affect the appellants in coming to a determination whether a tender should or should not be accepted. During the execution of such a contract a contingency arises by the intervention of the Legislature, or of a department authorized by the Legislature, which renders the further continuance of the execution of the works illegal for a substantial and indefinite time, and which causes the removal of a large portion of the plant employed to Government works or for Government purposes. I use the word "indefinite" since there is no certainty of the time of the duration of the war of which judicial cognizance can be taken. Can it be said that a risk of this kind was in the contemplation of either party at the date of the contracts? The necessary implication appears to me to be that it is a risk which no contractor would contemplate to be a risk under his contract, and which no public body controlling public funds could have regarded as a possibility affecting their liability in the absence of express provision. It is not necessary to say that the works are not physically possible, or could not practically be carried out as a business adventure, at a subsequent date. I agree that the probability of hardship to one side or the other is not a matter of material consideration, but it is quite a different matter when there is an indefinite and indeterminate liability which might impose on either party an unforeseen burden totally foreign to the ordinary incidents in a contract of this character, or which might not improbably eventuate in a loss to both parties without any compensating advantages. In my opinion the original contracts have ceased to be operative. It may well be that at some future period the various works will be executed, but it will be under a different contract based on changed considerations. All the prices will have to be fixed in reference to different conditions, and the time over which the work will be carried on will be wholly different. It is no answer that the engineer has certain powers over prices and time. These powers are incident to the original contracts, and were never intended to give the engineer a power to make new contracts binding either on the respondents or the appellants. I would desire in this connection to quote a passage from the opinion of Lord Atkinson in the *Tamplin Case* (1): "There is here involved such a substantial invasion of that freedom of both parties to exercise the

(1) [1916] 2 A. C. 422.

H. L. (E.) 1917

METROPOLITAN WATER BOARD v. DICK, KERR AND COMPANY.

Lord Parmoor.

rights and discharge the obligations secured to and imposed upon them by the charterparty, the continued existence of which must, I think, have necessarily been in their contemplation as to the foundation of their contract when they entered into it, that, in the events which have happened, each of them is now entitled to treat it as at an end." This passage is applicable to a case like the present, where the continued erection of the contract works has been rendered illegal, and the freedom of both parties has been directly invaded by the operation of law.

My Lords, many cases were called to the attention of your Lordships during the hearing of the appeal, but I think it is only necessary to refer to one of these, in a case depending on illegality. I refer to the case of *Baily* v. *De Crespigny* (1), a leading case on the principles applicable, where land is taken for public purposes under a private Act of Parliament. In this case it was held that the defendant was discharged from a covenant by a subsequent Act of Parliament which compelled him to assign to a railway company, and so put it out of his power to perform the covenant on the principle that "lex non cogit ad impossibilia." I think that the reasoning contained in the judgment of Hannen J. (2) is applicable to the present case, and that the law will not enforce the fulfilment of a contract where the Legislature has introduced substantial and indefinite limitations which the parties cannot be held to have contemplated when making the contract: "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." The learned

(1) L. R. 4 Q. B. 180. (2) L. R. 4 Q. B. 185.

judge later referred to the case of *Brewster* v. *Kitchell* (1), and says (2): "The rule laid down in *Brewster* v. *Kitchell* (1) rests upon this ground, that it is not reasonable to suppose that the legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the legislature itself prevented his fulfilling."

My Lords, in my opinion the appeal fails and should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 26, 1917.

Solicitor for appellants: *Walter Moon.*

Solicitors for the respondents: *Linklater, Addison & Brown.*

[HOUSE OF LORDS.]

GREAT WESTERN RAILWAY COMPANY . . APPELLANTS;

AND

HELPS . . . . . RESPONDENT.

Workmen's Compensation—Assessment—Earnings of Railway Porter—Tips—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 1 (*b*).

For the purpose of assessing the compensation payable under the Workmen's Compensation Act, 1906, to a railway porter who has sustained injuries by accident arising out of and in the course of his employment, gratuities or "tips" received by him from passengers whom he has assisted in the execution of his duties, where the practice of giving and receiving tips is open and notorious and is sanctioned by the railway company, are included in his earnings.

Penn v. *Spiers & Pond, Ld.* [1908] 1 K. B. 766 approved.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal affirming an award of the judge of the Bath County Court under the Workmen's Compensation Act, 1906.

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

---

(1) Salk. 198. (2) L. R. 4 Q. B. 187.

H. L. (E.) 1917 GREAT WESTERN RAILWAY v. HELPS.

The respondent was employed by the appellants, the Great Western Railway Company, as a passenger porter at their station at Bath. On September 23, 1916, he sustained injuries by accident arising out of and in the course of his employment. His average weekly wages amounted to 1*l.* 5*s.* 10*d.* In addition he received gratuities or "tips" from passengers on the railway amounting on the average to 12*s.* a week. The respondent claimed that the amount which he received in tips should be taken into account in arriving at his average weekly earnings for the purpose of compensation under the Act; that his average weekly earnings in the employment were accordingly 1*l.* 17*s.* 10*d.*, and that the compensation to which he was entitled during the period of total incapacity should be calculated at the rate of 18*s.* 11*d.*, i.e. 50 per cent. of 1*l.* 17*s.* 10*d.* a week. The appellants contended that the average weekly earnings of the respondent in their employment amounted to 1*l.* 5*s.* 10*d.* and no more, and they admitted liability to pay the respondent 50 per cent. of that sum, namely, 12*s.* 11*d.*

On January 5, 1917, the respondent filed a request for arbitration for the purpose of having this question determined.

The facts found by the learned county court judge were as follows: Up to January 1, 1913, there was a rule by which the porters of the Great Western Railway Company were bound forbidding them to take tips. That rule was rescinded on that date and the following rule was substituted for it: "No servant of the company is allowed to solicit gratuities from passengers or other persons." The taking of tips by porters on the Great Western Railway had been going on practically unrestricted for years and the giving and receiving of tips had been open and notorious, and the learned judge found as a fact that this practice had been sanctioned by the company. The amount of wages which a man in any particular grade received was not affected by the tips he might obtain from travellers. There were three different classes of station on the line: first class, second class, and third class—Paddington was a first-class station and Bath a second-class station—and the man's wages depended, not upon the amount of tips he received, but upon the station at which he was located. The bigger the station the more wages he received and the more tips, but tips were not taken into consideration when a man was put at one or other of the stations. Upon these facts

the learned county court judge held that this case was covered by *Penn* v. *Spiers & Pond, Ld.* (1), and that the tips received by the respondent were earned in his employment, and he awarded him compensation on this basis. This award was affirmed by the Court of Appeal (Lord Cozens-Hardy M.R., Bankes L.J., and Warrington L.J.).

Nov. 29, 30. *Schiller, K.C.*, and *Cotes-Preedy*, for the appellants. This is really an appeal against *Penn* v. *Spiers & Pond, Ld.* (1), by which the Court of Appeal thought themselves bound. *Knott* v. *Tingle Jacobs & Co.* (2), which is very shortly reported, simply followed *Penn* v. *Spiers & Pond, Ld.* (1) and carries the matter no further. Tips received by a railway porter are no part of his earnings, but are voluntary gratuities contributed by the passengers using the railway, and unless they expressly or impliedly form part of the contract of employment, as where they are taken into account in fixing the remuneration, they ought not to be taken into consideration. "Earnings" under the Workmen's Compensation Act means the money for which the man is engaged to work: *Abram Coal Co.* v. *Southern* (3); *Midland Ry. Co.* v. *Sharpe.* (4) The primary object of the Act is to compensate for loss of wages, and its language points to a payment as the result of the contract of employment. Nothing forms part of a man's earnings unless it is received by him under and by virtue of his contract of employment. It follows that tips are not earnings where the contract of employment is made independently of that consideration. Here the tips are not made part of the wages, and the larger the station the higher the wages, although the tips are greater at a large station than at a small one. In *Williams* v. *Owners of S.S. Maritime* (5) the Court, in considering the question of remuneration under the Act, declined to take into account ex gratia payments. In *Skailes* v. *Blue Anchor Line* (6) Fletcher Moulton L.J. in his dissentient judgment, speaking of remuneration under the Act, said that that meant remuneration under the contract, and he discriminated between remuneration and average weekly earnings, whereas the

(1) [1908] 1 K. B. 766.
(2) (1910) 4 B. W. C. C. 55.
(3) [1903] A. C. 306.
(4) [1904] A. C. 349, 351
(5) [1915] 2 K. B. 137.
(6) [1911] 1 K. B. 360

H. L (E.) 1917 GREAT WESTERN RAILWAY v. HELPS

other members of the Court said that remuneration was the same thing as earnings. If, as is submitted, he was right in saying that remuneration meant remuneration under the contract of employment, and the majority were right in saying that remuneration and earnings were synonymous terms, the appellants are entitled to succeed. One of the objects of the Act is that the employer may know the liability which he has to provide against, and he cannot know the amount of tips received by his workmen. The Legislature never intended to impose upon the employer such a vague liability as this.

Holman Gregory, *K.C.*, and *Wethered*, for the respondent, were not called on.

LORD DUNEDIN. My Lords, this is an exceedingly clear case. The facts are simple. The respondent was a passenger porter at a station at Bath, and in his usual avocation as a porter he was in the habit of getting tips from passengers; he was injured in the course of his employment by an accident arising out of his employment, and it is not denied that he is entitled to compensation; but the controversy between the parties is whether, in estimating this compensation, there is to be taken into account, not only the weekly wage which he gets from the company, but also such sum as represents his average takings in this matter of tips.

My Lords, it was only a few weeks ago that I had occasion in this House, in the case of the *Woodilee Coal Co.* (1), to point out that compensation which is directed to be paid by the employer to a workman who is injured by accident arising out of and in the course of his employment under s. 1 of the Workmen's Compensation Act has its natural meaning—that is to say, something that is to be paid which makes up for the loss that the man has sustained. It is quite true that the full measure of the compensation is afterwards cut down by several rules, because the compensation which is directed to be paid under the first section is not compensation in general, but is compensation in accordance with the First Schedule, and when we go to the First Schedule we find certain things which, so to speak, cut down the compensation. But when we go to the First Schedule we find a set of rules there for the computation which has

(1) Ante, p. 43.

the phrases "earnings," and "average weekly earnings," and it is upon a computation based upon earnings and average weekly earnings that a sum is arrived at. The whole point, therefore, is, do these tips fall within the statutory expression of "earnings"? If you were to ask a person in ordinary common parlance what this porter earned, the answer would be: "Well, I will tell you what he gets; he gets so much wages from his employers, and he gets on an average so much in tips."

My Lords, it has been sought in the argument addressed for the appellants to limit the meaning of "earnings" to what the workman gets by what I may call direct contract from his employers. The simple answer is that the statute does not say so; it uses the general term "earnings" instead of the term "wages" or the expression "what he gets from his employer," and as a matter of fact the employer, in a case where there is a known practice of giving tips, obviously gets the man for rather less direct wages than he would if there was not that other source of remuneration to the man when he is in his post. More than that, in this case the employer is absolutely party and privy to the whole arrangement. The learned arbitrator found as a fact "That the giving and receiving of these tips has been open and notorious. I find as a fact that they have been sanctioned by the employers." Now that fact found by the arbitrator could only be challenged on one of two grounds—either if it was founded upon some erroneous legal proposition which underlay it, or if it was a fact which had no evidence in the case to support it. It is quite obvious that neither of those objections can be stated in this case against the finding, and therefore the finding rules. The result is that these tips are part of the man's ordinary earnings.

My Lords, I entirely go with the decision of the Court of Appeal in the case of *Penn* v. *Spiers & Pond, Ld.* (1), which was decided in 1908, and I would especially also commend the very careful limitation that is laid down in that case by the Master of the Rolls where he says: "To avoid misconception, we desire to state that nothing in this judgment extends to 'tips' or gratuities (*a*) which are illicit; (*b*) which involve or encourage a neglect or breach of duty on the part of the recipient to his employer; or (*c*) which are casual and

(1) [1908] 1 K. B. 766, 770.

H. L. (E.) 1917 GREAT WESTERN RAILWAY v. HELPS. Lord Dunedin.

sporadic and trivial in amount." There is here, as I have already pointed out, a direct finding which shows that (*c*) is excluded in this case.

As regards the subsequent case of *Skailes* (1), not only do I find that the majority of the Court adhered to the judgment in *Penn* (2), but the dissentient member of the Court, Fletcher Moulton L.J., dissents not because he does not agree with *Penn* (2)—indeed he was a party to that judgment himself—but because, the question there being upon s. 13, what was the true meaning of "remuneration," he held that "remuneration" and "earnings" were not synonymous terms, whereas the other learned judges held that they were.

My Lords, I think the appeal should be dismissed.

LORD ATKINSON. My Lords, I concur, and I have nothing to add.

LORD PARKER OF WADDINGTON. My Lords, I concur.

LORD SUMNER. My Lords, I concur.

LORD PARMOOR. My Lords, I think that the true effect of Mr. Schiller's argument would be to limit earnings to the amount which an employee is entitled to claim under or in consequence of his contract of service. I use those two words because Mr. Schiller used them. I think that this construction of the Workmen's Compensation Act is not accurate, and that the word "earnings" is not so limited in its meaning. If it is not so limited, then the question arises whether notorious tips, such as are received by a railway porter, should be taken into account. It was within the competence of the arbitrator to find that the tips in question were earned by the applicant in his employment, and that appears to me to be a finding which settles the matter in this case.

The history of these tips points in the same direction. It is quite accurately stated by the Master of the Rolls in his judgment in these words: "At one time, and for a good many years, the Great Western Railway Company had a rule which said that no gratuity is allowed to be taken from passengers or other persons by any servant of the company. It was found that that rule was

(1) [1911] 1 K. B. 360. (2) [1908] 1 K. B. 766, 770.

habitually disregarded; it was a mere waste of paper; and in 1913 new rules were passed. The old one was abolished, and there is this one now: that no servant of the company is allowed to solicit gratuities from passengers or other persons."

My Lords, I should like to associate myself with the caution expressed by the noble and learned Lord on the woolsack, that the decision in this case is applicable to tips which are notorious and well known, and not to tips which are casual and sporadic and trivial in amount.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 30, 1917.

Solicitor for appellants: *L. B. Page.*

Solicitors for respondent: *Church, Adams, Prior & Balmer, for Arthur E. Withy, Bath.*

[PRIVY COUNCIL.]

J. C.*
1917
Oct. 16.

THE HAKAN.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Neutral Ship—Contraband Cargo—Condemnation of Ship—Knowledge of Character of Cargo—Conditional Contraband—Foodstuffs requisitioned by Enemy Government.

Conditional contraband goods consigned to an enemy port can properly be condemned whenever the Court is of opinion that, under all the circumstances brought to its knowledge, they were probably intended to be applied for warlike purposes of the enemy. Knowledge of the confiscable character of the goods on the part of the owner of the ship is sufficient to justify the condemnation of the ship—at any rate, where the goods in question constitute a substantial part of the whole cargo.

In January, 1916, the Swedish owners of a ship chartered her to German fish merchants for voyages from Scandinavian to German Baltic ports. The ship was captured on April 4, 1916, while carrying under the charterparty a cargo of salted herrings to Lübeck, a German port. Foodstuffs were declared to be conditional contraband on August 4, 1914. The consignees of the herrings were bound to hand them over to a German company, appointed by the German Government for purposes connected with the Government control of foodstuffs, that control being rendered necessary by the war and the consequent scarcity of food in Germany:—

Held, upon the facts, that the cargo was confiscable, and that the ship was properly condemned since the owners must have known the facts which rendered the cargo liable to condemnation.

APPEAL from a judgment of the President of the Probate, Divorce, and Admiralty Division (in Prize), delivered on July 3, 1916 (1).

The appellants, a Swedish firm carrying on business at Gothenburg, were the owners of the steamship *Hakan*, which was condemned by a judgment of the President (Sir Samuel Evans) on the ground that she was captured while carrying a contraband cargo.

The facts appear from the judgment of their Lordships.

The learned President held that, apart from the provisions of

* *Present:* LORD PARKER OF WADDINGTON, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) [1916 P. 266.

art. 40 of the Declaration of London, 1909, the action and the views expressed by the chief maritime States before and since the International Naval Conference of 1908-1909 justified the Prize Court in accepting as part of the law of nations the rule, stated in art. 40, that "a vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo." He considered that where the contraband being carried exceeded the above stated proportion it was not necessary to prove knowledge on the part of the owner or master that the goods in question were destined for the enemy. He held that the owner, or the master on his behalf, must be taken to know the nature and destination of the cargo. Upon the facts of the present case, however, he found that the ship having been chartered at a freight representing 200 per cent. per annum upon her capital or insurable value there could be no doubt that the owners knew that she was to be employed in the contraband trade between Scandinavia and German Baltic ports. The *Hakan* accordingly was condemned.

1917. July 24, 25. *Balloch*, for the appellants. First, the cargo was only conditional contraband and was not liable to condemnation. It was not shown that Lübeck was a base for the supply of the German military or naval forces. The facts proved do not warrant the conclusion that the cargo was intended for warlike purposes of the enemy, which is the test laid down in *The Jonge Margaretha*. (1) Secondly, even if the goods were confiscable the ship was not liable to condemnation. The established rule of international law is that a ship carrying contraband is not liable to condemnation unless the owner of the ship is also owner of the contraband goods, or there are some circumstances of fraud. [Upon this head the argument was that appearing in the report, at [1916] P. 266, of the hearing in the Court below, reference being made to cases there mentioned.] Art. 40 of the Declaration of London differs from and is not a relaxation of the rule, and therefore the Order in Council adopting it is not binding upon the Prize Court: *The Zamora*. (2) There was no circumstance of fraud, such as falsification of papers, which justified condemnation. Mere knowledge is not sufficient. If,

(1) (1799) 1 C. Rob. 189. (2) [1916] 2 A. C. 77.

J. C. 1917 THE HAKAN.

however, it is, it was not proved, nor can it properly be inferred that the appellants had knowledge of the facts necessary to be proved in order to render the cargo confiscable.

Sir Frederick Smith, A.-G., Sir Gordon Hewart, S.-G., and *R. A. Wright,* for the Crown (being directed by their Lordships to deal with the question whether the appellants had knowledge). The facts in relation to the chartering of the ship render it impossible to doubt that the appellants knew all the material circumstances. It was not suggested before the President that they had not knowledge.

[They were stopped.]

Balloch replied.

Oct. 16. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. The Swedish steamship *Hakan*, the subject of this appeal, was captured at sea by H.M.S. *Nonsuch* on April 4, 1916, having sailed the same day from Haugesund in Norway on a voyage to Lübeck in Germany with a cargo of salted herrings. Foodstuffs had as early as August 4, 1914, been declared to be conditional contraband. The writ in the present proceedings claimed condemnation of both ship and cargo, the former on the ground that it was carrying contraband goods and the latter on the ground that it conssited of contraband goods.

It should be observed that the cargo, being on a neutral ship, was, even if it belonged to enemies, exempt from capture unless it consisted of contraband goods (see the Declaration of Paris).

The cargo owners did not appear or make any claim in the action, although, according to the usual practice of the Prize Court, even enemies may appear and be heard in defence of their rights under an international agreement. The question whether the goods were contraband was, however, fully argued by counsel for the owners of the ship, a Swedish firm carrying on business at Gothenburg. The President condemned the cargo as contraband. He also condemned the ship for carrying contraband. The owners of the ship have now appealed to His Majesty in Council. Under these circumstances the first question to be decided is whether the cargo was rightly condemned as contraband, for if it was not there could be no case against the ship.

In their Lordships' opinion, goods which are conditional contra-

band can be properly condemned whenever the Court is of opinion, under all the circumstances brought to its knowledge, that they were probably intended to be applied for warlike purposes: *The Jonge Margaretha.* (1) The fact alone that the goods in question are on the way to an enemy base of naval or military equipment or supply would justify an inference as to their probable application for warlike purposes. But the character of the place of destination is not the only circumstance from which this inference can be drawn. All the known facts have to be taken into account. The fact that the goods are consigned to the enemy Government, and not to a private individual, would be material. The same would be the case if, though the goods are consigned to a private individual, such individual is in substance or in fact the agent or representative of the enemy Government.

In the present case Lübeck, the port of destination of the goods, is undoubtedly a port used largely for the importation into Germany of goods from Norway and Sweden; but it does not appear whether it is used exclusively or at all as a base of naval or military equipment. On the other hand, it is quite certain that the persons to whom the goods were consigned at Lübeck were bound forthwith to hand them over to the Central Purchasing Company, of Berlin, a company appointed by the German Government to act under the direction of the Imperial Chancellor for purposes connected with the control of the food supplies rendered necessary by the war. The proper inference seems to be that the goods in question are in effect goods requisitioned by the Government for the purposes of the war. It may be quite true that their ultimate application, had they escaped capture, would have been to feed civilians, and not the naval or military forces of Germany; but the general scarcity of food in Germany had made the victualling of the civil population a war problem. Even if the military or naval forces of Germany are never supplied with salted herrings, their rations of bread or meat may well be increased by reason of the possibility of supplying salted herrings to the civil population. Under these circumstances, the inference is almost irresistible that the goods were intended to be applied for warlike purposes, and, this being so, their Lordships are of opinion that the goods were rightly condemned.

(1) 1 C. Rob. 189.

J. C. 1917 THE HAKAN.

The second question their Lordships have to determine relates to the condemnation of the ship for carrying the goods in question. It is, of course, quite clear that if art. 40 of the Declaration of London (1) be applicable, the ship was rightly condemned, inasmuch as the whole cargo was contraband. The Declaration of London has, however, no validity as an international agreement. It was, it is true, provided by the Order in Council of October 29, 1914, that during the present hostilities its provisions should, with certain very material modifications, be adopted and put in force. But the Prize Court cannot, in deciding questions between His Majesty's Government and neutrals, act upon this Order except in so far as the Declaration of London, as modified by the Order, either embodies the international law or contains a waiver in favour of neutrals of the strict rights of the Crown. It is necessary, therefore, to consider the international law with regard to the condemnation of a ship for carrying contraband apart from the Declaration of London.

It seems quite clear that at one time in our history the mere fact that a neutral ship was carrying contraband was considered to justify its condemnation, but this rule was subsequently modified. Lord Stowell deals with the matter in *The Neutralitet*. (2) "The modern rule of the law of nations is, certainly," he says, "that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise; and it cannot be denied, that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscable for that act. But this rule is liable to exceptions:—where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted

(1) Art. 40: "A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo."

(2) (1801) 3 C. Rob. 295.

cases out of the modern rule, and to continue them under the ancient one."

It is to be observed that Lord Stowell does not say that the particular cases he refers to are the only exceptions to the modern rule. On the contrary, his actual decision in *The Neutralitet* (1) creates a third exception. It should be observed, too, that in a later part of his judgment he states the reason for the modification of the ancient rule to be the supposition that noxious or doubtful articles might be carried without the personal knowledge of the owner of the ship. He held in the case before him that this ground for the modification of the rule entirely failed, so that the ancient rule applied. The reasoning is sound. For if the ancient rule was modified because of the possible want of knowledge on the part of the shipowner, it is perfectly logical to treat actual knowledge on the part of the shipowner as a good ground for excepting any particular case from the modern rule. Knowledge will also explain the two main exceptions to which Lord Stowell refers. If the shipowner also owns the contraband cargo, he must have this knowledge ; and if he sails under a false destination or with false papers, it is quite legitimate to infer this knowledge from his conduct. In his earlier decision in *The Ringende Jacob* (2) Lord Stowell had stated the modern rule to be that the carrying of contraband is attended only with loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances. If by malignant and aggravating circumstances Lord Stowell meant only circumstances from which knowledge of the character of the cargo might be properly inferred, the rule thus stated does not differ from that laid down in the subsequent case of *The Neutralitet.* (1) But the words used have by some writers been taken as indicating that, in Lord Stowell's opinion, besides knowledge of the character of the cargo, there must be on the part of the shipowner some intention or conduct to which the epithets " malignant or aggravating " can be applied in a real as opposed to a rhetorical sense. Any such hypothesis seems, however, to vitiate the reasoning of Lord Stowell in *The Neutralitet.* (1) Sailing under a false destination or false papers may

(1) 3 C. Rob. 295. (2) (1798) 1 C. Rob. 89.

J. C. 1917 THE HAKAN.

possibly be called malignant or aggravating. There is not only the knowledge of guilt, but an attempt to evade its consequences. But in the case of the shipowner who also owns the contraband on board his ship it is difficult to see where the malignancy or aggravation lies, if it be not in the knowledge of the character of the goods on board. If it be malignant or aggravating on the part of the owner of the goods to consign them to the enemy, it must be equally malignant and aggravating on the part of the shipowner knowingly to aid in the transaction.

Nevertheless, it was this construction of Lord Stowell's words in *The Ringende Jacob* (1) rather than the reasoning on which his decision in *The Neutralitet* (2) case was based that was adopted by the Supreme Court of the United States in the case of *The Bermuda*. (3) In that case Chase C.J., in delivering the opinion of the Court, says as to the relaxation of the ancient rule: "It is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or, at least, without intent on his part to take hostile part against the country of the captors; and it must be recognized and enforced in all cases where that presumption is not repelled by proof. The rule, however, requires good faith on the part of the neutral, and does not protect the ship where good faith is wanting. . . . . Mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith. There must be circumstances of aggravation. The nature of the contraband articles and their importance to the belligerent, and the general features of the transaction, must be taken into consideration in determining whether the neutral owner intended or did not intend, by consenting to the transportation, to mix in the war."

Passing from the English and American decisions to the views which were at the commencement of the present hostilities entertained by the Prize Courts or jurists of other nations, we find what at first sight appears to be considerable divergence of opinion. If, however, the true principle be that knowledge of the character of the cargo is a sufficient ground for depriving a shipowner of the benefit of the modern rule, this divergence is more apparent than

(1) 1 C. Rob. 89. (2) 3 C. Rob. 295.
(3) (1865) 3 Wall. 514, 555.

real. It reduces itself to a difference of opinion as to the circumstances under which the knowledge may be inferred, and if it be remembered that knowledge on the part of the shipowner of the character of the cargo must be largely a matter of inference from a great variety of circumstances, such difference of opinion is readily intelligible.

Referring, for example, to the view entertained in Holland, their Lordships find that, although the ship is prima facie confiscable if an important part of the cargo be contraband, proof that the master or the charterers could not have known the real nature of the cargo will secure the ship's release. In other words, the proportion of the contraband to the whole cargo raises a presumption of knowledge which may be rebutted. Again, according to the views held in Italy, the ship carrying contraband is liable to confiscation only where the owner was aware that his vessel was intended to be used for the carrying of contraband. Here knowledge is made the determining factor, the manner in which knowledge is to be proved or inferred being left to the general law. Again, according to the views entertained in Germany, a ship carrying contraband can only be confiscated if the owner or the charterer of the whole ship or the master knew or ought to have known that there was contraband on board, and if that contraband formed more than a quarter of the cargo. Here also knowledge is made the determining factor, though there is a concession to the neutral if the proportion of the contraband to the whole cargo be sufficiently small. Once more, in France the test of the right to confiscate is whether or not the contraband is three-fourths in value of the whole cargo. This view may be looked on as defining the circumstances in which an irrebuttable inference of knowledge arises. The views entertained in Russia and Japan are similarly explicable. In their Lordships' opinion the principle underlying all these views is the same. There can be no confiscation of the ship without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo, but in some cases the inference as to knowledge arising from the extent to which the cargo is contraband cannot be rebutted, while in others it can, and in some cases, even where there is the requisite knowledge, the contraband must bear a minimum proportion to the whole cargo.

It follows that the views entertained by foreign nations point to

J. C. 1917 THE HAKAN.

knowledge of the character of the goods being alone sufficient for condemnation of a vessel for carrying contraband; in other words, they support the principle to be derived from the reasoning in *The Neutralitet* (1) rather than the principle which has been deduced from the dictum in *The Ringende Jacob* (2) and developed in *The Bermuda*. (3) It should be observed that both Westlake and Hall agree that knowledge is alone sufficient to justify confiscation: see Westlake, International Law (War), 2nd ed., p. 291; Hall, International Law, 6th ed., p. 666.

Their Lordships consider that in this state of the authorities they ought to hold that knowledge of the character of the goods on the part of the owner of the ship is sufficient to justify the condemnation of the ship—at any rate, where the goods in question constitute a substantial part of the whole cargo.

In the light of what has been said as to the rule of international law their Lordships will now proceed to consider the special facts of this case. The owners of the ship are a Swedish firm carrying on business at Gothenburg. On January 8, 1916, they chartered the ship to a German firm of fish dealers for a period of six weeks from the time when the vessel was placed at charterers' disposal, with power for the charterers to prolong this period up to May 16, 1916. The voyages undertaken by the charterers were to be from Scandinavian to German Baltic ports. It must have been quite evident to the owners that the ship would be used for the importation of fish into Germany. They must also have known that foodstuffs were conditional contraband. It is almost inconceivable that they did not also know of the food difficulties in Germany and of the manner in which the German Government had in effect requisitioned salted herrings to meet the exigencies of the war. They had an opportunity in the Court below of establishing their want of knowledge if it existed, but they did not attempt to do so. The inference that they did in fact know that the vessel would be used for the purpose for which it was used is irresistible. If knowledge of the character of the goods be the true criterion as to confiscability, the vessel was rightly condemned.

Even on the hypothesis that something beyond mere knowledge

(1) 3 C. Rob. 295. (2) 1 C. Rob. 89.
(3) 3 Wall. 514.

J. C. 1917 THE HAKAN.

of the character of the cargo is required, something which may be called " malignant or aggravating " within the principles of *The Ringende Jacob* (1) or *The Bermuda* (2) decisions, that something clearly exists in the present case. A shipowner who lets his ship on time charter to an enemy dealer in conditional contraband for the purposes of his trade at a time when the conditional contraband is vitally necessary to and has been requisitioned by the enemy Government for the purpose of the war is, in their Lordships' opinion, deliberately " taking hostile part against the country of the captors " and " mixing in the war " within the meaning of those expressions as used by Chase C.J. in *The Bermuda.* (2)

In their Lordships' opinion, the appeal fails and should be dismissed with costs.

Solicitors for appellants : *Botterell & Roche.*
Solicitor for respondent : *The Treasury Solicitor.*

[PRIVY COUNCIL.]

THE PARCHIM.

J. C.* 1917 *Nov.* 6.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Cargo—Sale—Passing of Property—Application of English Law—Goods at Risk of Buyer—Bills of Lading in Name of Seller—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 17, 18, 19.

The Prize Court in determining who is the owner of goods shipped under a contract of sale and seized as prize should do so in accordance with the municipal law of England as codified in the Sale of Goods Act, 1893, that law being based upon mercantile usages common in their general operation to all nations. If the parties contracted with reference to a municipal law which is proved to differ from the English law, that fact is material in considering the intention of the parties as to the passing of the property.

Although property, and not risk, is the test of enemy character

---

* *Present :* LORD PARKER OF WADDINGTON, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) 1 C. Rob. 89. (2) 3 Wall. 514.

J. C.
1917
THE PARCHIM.

of goods, the incidence of the risk as between buyer and seller is a very strong indication as to which of them owns the property.

Consideration of the circumstances which rebut the presumption, arising under the Sale of Goods Act, 1893, s. 19, sub-s. 2, that a seller of goods shipped who takes bills of lading in his own name intends to reserve the right of disposal.

The property in goods shipped under a contract of sale made before the outbreak of war can pass from the enemy seller to the neutral buyer while the goods are in transit after the outbreak of war.

APPEAL from a judgment of the President of the Admiralty Division (in Prize), delivered on November 1, 1915.

The appellants, N. V. Veendammer Kunstmesthandel, were a company registered and carrying on business in Holland. They claimed as their property a complete cargo of nitrate seized in the Russian sailing ship *Parchim* at Plymouth on December 6, 1914.

The facts appear from the judgment of their Lordships.

The President (Sir Samuel Evans) condemned the cargo on the ground that it was the property of the sellers, H. Fölsch & Co., a German company.

The learned President held that the presumption that the sellers by taking bills of lading in their own names had reserved the right of disposal was not rebutted by the other circumstances of the case. He rejected a contention that, if the property did not pass upon shipment, there had been a complete appropriation, passing the property, upon the invoice being sent to the appellants. Upon that point he held, first, that the appropriation was not unconditional, and, secondly, that the property could not pass while the goods were in transit after the outbreak of war.

1917. July 20. *MacKinnon*, *K.C.*, and *C. R. Dunlop*, for the appellants. The cargo was shipped in pursuance of a contract made before the war. The property could, therefore, pass from the enemy sellers while the goods were in transit: *The Daksa* (1) and cases there cited. The whole cargo was appropriated to the contract upon shipment, and, prima facie, the property then passed; at any rate, it passed when the invoice was sent. It should not be inferred that the sellers by taking bills of lading in their own names reserved

(1) [1917] A. C. 386.

the right of disposal. By s. 19, sub-s. 1, of the Sale of Goods Act, 1893, a reservation of the right of disposal must by the terms of either the contract or the appropriation; here there were no such terms. In any case, the presumption is rebuttable: *Joyce* v. *Swann* (1); Sale of Goods Act, 1893, s. 19, sub-s. 2. By the effect of the contract the goods were at the risk of the appellants; Lord Stowell in *The Packet de Bilbao* (2) asks "what surer test of property can there be than this?" In a matter depending upon international law, and not upon the technicalities of the English law as to the passing of property, that test is conclusive. In any case that fact, combined with the other circumstances, indicates that the intention was to pass the property. Any presumption arising from the form of the bills of lading is thereby rebutted. [*The Prinz Adalbert* (3) and *The Miramichi* (4) were also referred to.]

Sir Gordon Hewart, *S.-G.*, and *T. Mathew* (*Sir Frederick Smith*, *A.-G.*, with them), for the Crown. The question for determination is in whom was the ownership at the date of the seizure, and not in whom was the risk: *The Odessa.* (5) The law to be applied is the municipal law of this country—at any rate, in the absence of evidence of any foreign law applicable to the case. There is nothing in the documents or facts which rebuts the presumption arising from the form of the bills of lading: *Wait* v. *Baker* (6); *Joyce* v. *Swann* (1); *Turner* v. *Liverpool Docks Trustees.* (7) [Reference was also made to the Proceedings of the International Naval Conference, 1909, Blue Book Cd. 4555, p. 279, and the Declaration of London, art. 58.]

Dunlop in reply. The sellers' intention in taking the bills of lading in their own names may have been to preserve their lien; that, however, is not a reservation of the property.

Nov. 6. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. This is an appeal from a decree of the Prize Court in England, whereby the cargo of nitrate of soda seized on board of a Russian ship, the *Parchim*, was condemned as

(1) (1864) 17 C. B. (N.S.) 84.
(2) (1799) 2 C. Rob. 133, 135.
(3) [1917] A. C. 586.
(4) [1915] P. 71.
(5) [1916] 1 A. C. 145.
(6) (1848) 2 Ex. 1.
(7) (1851) 6 Ex. 543.

J. C. 1917 THE PARCHIM.

lawful prize on the ground that it was enemy property at the date of capture. The appellants, a Dutch company, claimed the property as belonging to them, and, their claim having been dismissed, they now appeal.

The facts of the case are not seriously in dispute, though some details are not quite clear. The case turns for the most part on the proper inferences to be drawn from the facts and on the principles of law which should be applied.

It is well settled that the enemy character of goods seized as prize is to be determined by property and not by risk. So far as the Court below is concerned, this point may be taken as finally decided by the judgment of the learned President in *The Miramichi*. (1) Their Lordships were invited to review that decision, but in their opinion this same rule was adopted by this Board in *The Odessa*. (2) The latter case, which is binding on all Courts finally determined not only that property as opposed to risk was the real criterion, but that the property to be looked for was the general property as opposed to any special proprietary right, the reason being that the existence of a general property or "dominium" in personal chattels is recognized by the law of all civilized nations, whereas the existence of special rights and the question whether such rights are proprietary or otherwise depends largely on the particular municipal law which may be applicable. Thus the special property of a pledgee according to English law was ignored.

It was further contended that, in view of the principles explained in *The Odessa* (2), the practice which has prevailed in the Prize Court, and has in some cases at any rate been followed by this Board, of deciding in accordance with English law to whom the property in captured goods belonged is altogether wrong. Their Lordships cannot accept this contention. Not only is it difficult to suggest any possible alternative, but it will appear upon a little consideration that the practice itself is just and equitable. The municipal law of this country as to the transfer of property in chattels is a branch of our commercial law, and based on mercantile usages common in their general substance and operation to the merchants of all nations.

The Sale of Goods Act, 1893, is in fact merely a codification,

(1) [1915] P. 71. (2) [1916] 1 A. C. 145.

and, as is generally admitted, a very successful and correct codification, of this branch of English mercantile law. It embodies the principle that the question whether a contract for the sale of goods does or does not pass the general property in the goods contracted to be sold must in all cases be determined by the intention of the parties to the contract. The Act codifies the rules by which that intention is to be ascertained, but the inferences based on the rules may always be displaced by the terms of the contract itself or the surrounding circumstances, including the conduct of the parties. No doubt the municipal law with reference to which the parties enter into the particular transaction is material in considering their intention as to the passing of the property; and if it appears that they contracted with reference to a municipal law other than English, and it be further proved that that municipal law is different in any material respect from the English law, this will of course be taken into account in determining their intention. But having regard to the presumption that unless the contrary be proved the general law of a foreign country is the same as the English law, the mere fact that the contract was entered into with reference to the law of another country will be immaterial. Having regard to the history of English mercantile law, the presumption referred to is itself quite reasonable. An investigation of the commercial codes of foreign countries would probably show that they differ from English commercial law rather in detail or in the inference to be drawn from particular facts than in substance or principle. For example, in countries where the civil law is more directly the basis of modern law than it is in this country, somewhat greater importance may be attached to risk as an indication of property. Or, again, the inference to be drawn from the possession of a bill of lading indorsed in blank may be somewhat stronger than it is in our law.

Their Lordships therefore are of opinion that in the present case the English municipal law, including the Sale of Goods Act, 1893, was rightly applied in determining the character of the cargo at the date of capture.

Passing to the facts of the case, their Lordships do not find that any doubt has been suggested by the Crown as to the bona fides of the contract, which was not entered into either

J. C. 1917 THE PARCHIM.

during or in expectation of the war or of the dealings of the parties under the contract.

A German firm, H. Fölsch & Co., of Hamburg, have a branch at Valparaiso in Chile. They appear to have done a considerable business in shipping nitrate from Chile, and to have had a considerable quantity ready for shipment shortly before the war. On May 6, 1914, by a charterparty set out in an appendix to this record, and which must be in a common form, as it has a heading "The Hamburg Nitrate Charterparty of 1891," they chartered the Russian sailing ship *Parchim*, of 1714 tons register, then at Callao, to carry a cargo of not more than 2700 tons and not less than 2600 tons of nitrate of soda in bags from one of certain named ports on the west coast of South America to a port within certain named limits in Europe. The vessel was to proceed in ballast from Callao to the port to be named for her loading, and the loading was not to commence before July 15; and if the vessel was not ready for loading on or before September 15 the charterers had power to cancel the charter. The vessel when loaded was to proceed to a port within the prescribed limits direct, if such port was named before sailing; and if no direct port was so named, then to Queenstown, Falmouth, or Plymouth for orders. Rates of freight varying slightly in various contingencies were provided for, and there was to be a reduction of 9*d.* per ton if a direct port was named. Taltal was named by the charterers as the port of loading under this charter. By contract dated July 13, 1914, H. Fölsch & Co., of Hamburg, sold to the appellants, who, as already stated, are a Dutch company, the whole cargo per *Parchim*. It is upon this contract, and on what was done under it, that the question in this appeal turns. It is rather special in its terms, but with the exception of one clause, as to the time when the invoice price was to become due, it is not at all ambiguous. Almost all the terms have to be considered, and, omitting a very few passages which do not appear important, it is as follows:—

The Dutch company bought, and the German firm sold, "The whole cargo of ordinary Chile saltpetre . . . . per *Parchim* 2650/2750 tons dead weight, at the price of 9*s.* 1*d.* per cwt. cost and freight Channel for orders to the United Kingdom or Continent between Havre and Hamburg," (certain ports excluded) "with a

deduction of 9*d.* per ton if duly ordered to a direct port upon " a certain basis of contract and analysis. " Position of the vessel: *Parchim* arrived at Taltal on June 18 as per Lloyd's Index. The relative charterparty stipulates loading days not before July 15, cancelling date September 15. The sellers to pay the cost of the telegram giving the order, but they are not responsible for its arrival in due time at the port of loading. The buyers have to take over the charter and letter of gratuity, if any, for the captain. . . . . Insurance, including war risk, to be covered by the sellers upon the invoice value, plus premium, plus 10 per cent. imaginary profit, and to be charged at 62/6 per cent. £, and the buyer has to accept the policy of insurance against payment of the premium and costs. Should the ship be lost before the loading is completed, this contract is cancelled for that part of the cargo which is not yet laden.

" The invoice price is due ninety days after receipt of the first bill of lading, and to be paid by the buyer three days before maturity, or in case of an earlier arrival already (i.e., of the *Parchim*), then against acceptance of the documents plus ¼ per cent. accept commission.

" The buyer provides at once first-class bank guarantee for 5000*l.* For the time between acceptance and maturity interest will be allowed at the rate of 1 per cent. below the London bank rate. . . . .

" In case the *Parchim* will be ordered to a French port . . . . the freight will be increased by one-third per ton as per charterparty. The buyer has the option not to commence discharging before February 1, 1915, as per the condition referred to in the charterparty, any extra insurance for laying up to be borne by the buyer.

" If the buyers make use at the proper time of the cancelling option of the charterparty on account of delay on the part of the ship, they have to ship the saltpetre by another vessel whenever opportunity arises, if possible, under similar conditions. Any freight difference pro and contra is for account of the buyers, also any hire for storing and/or fire insurance premium."

This, it will be seen, is not an ordinary c.i.f. contract. The insurance is separately provided for and the premium is not included in the price, and, although the price includes freight, it

J. C. 1917 THE PARCHIM.

is only the freight under the charterparty which the buyer is to take over. If the right to cancel that charterparty arises and the option to do so is exercised, the buyer has the responsibility of finding another ship to take the intended cargo. He has to pay any excess of freight over the chartered freight ; also he has to pay the storage for the nitrate until loaded on another vessel. As the sum included for freight in the price is a mere matter of calculation and would be payable separately by the buyer and deducted from the price, the price is really for cost only, and the contract has far more of the characteristics of a contract f.o.b. Taltal than it has of a contract c.i.f. European port. Although the right to cancel was provided for, there was very little probability of its becoming exercisable. The ship was to arrive in ballast from Callao, and, if the notice in Lloyd's Index proved correct, had arrived some time before the contract. Practically damage to the ship would be the only thing which could prevent her being ready to load before September 15. It is clear that what was really contemplated by the parties, although they provided for another somewhat remote contingency, was the shipment on the *Parchim* of a sufficient part of the nitrate which the sellers had ready, and the effect of the contract was to provide that on shipment, or at all events on notification of the shipment, the cargo was to be at the risk of the buyers. If the ship was lost during the loading, the contract was to be cancelled only as regards the part of the cargo not loaded. As to that already on board it was to stand, so that the buyer would have to pay for it, although he would not get it. As to that which was shipped and as to the whole when the shipment was complete, the buyer clearly comes under liability to pay the price at a future date, the exact date of payment, but not the liability to pay, being somewhat in doubt owing to the clause as to receipt of the bill of lading being somewhat ambiguous. The liability to pay arises and continues quite independently of anything which may happen to the cargo after shipment, and the substantial question for consideration is whether the parties did not intend that the property should pass at the time the risk was assumed.

As to the clause which contains the slightly ambiguous phrase mentioning receipt of the bill of lading, without saying receipt by whom, it may be well before considering it to state what was done

by the parties after the contract, as that throws considerable light on what they obviously accepted as the business meaning of the clause.

The Dutch port of Delfzyl was named by the buyers as the port to which the ship was to go direct, and the cablegram giving the direction duly arrived. The loading was completed by August 6, and bills of lading of that date in sets of three for various parcels, making up the whole cargo, were taken to the order of H. Fölsch & Co., of Valparaiso. At some time not stated, but before September 6, and either in Chile or in Europe, it does not appear which, they were indorsed in blank "H. Fölsch & Co." The exact course of post from Germany and Holland to Taltal and Valparaiso in Chile is not stated, but it can scarcely be doubted on the facts that there was no communication by mail despatched after the date of the contract and reaching Taltal before August 6. There is no evidence of any such communication by cable. The right inference upon the evidence is that the representatives of Fölsch & Co. in Chile did not know when they took the bills of lading either the terms of the contract of July 13 or its existence. In taking the bills of lading to order the representatives of H. Fölsch & Co. probably followed a usual course of business, and had the bills of lading made out in the form most likely to be convenient, whatever the dealings of the firm in Europe with the cargo might happen to be. They could hardly have done it with express reference to any knowledge they had of the terms of the contract, and unless the name of the buyer had been cabled to them they could not have taken them in any other form than they did. For anything which appears, they may have immediately indorsed them in blank.

On September 9 the first of each set of bills of lading had arrived in Europe and was on that day deposited duly indorsed at the sellers' bank in Amsterdam by the sellers, to whom, presumably, it had been sent by mail. Both parties have acted on the view that September 8 was the day from which the ninety days' credit was to run—that is to say, that it was the day of "the receipt of the first bill of lading" within the meaning of the contract. The appellants' counsel has argued that there was then a receipt of the bill of lading by the appellants, and in the sense that the bill of lading was then tendered for their inspection probably they did receive it.

J. C. 1917 THE PARCHIM.

But it seems quite clear from the whole clause that they were not then to take it from the sellers' bank, who held it. The provision as to their taking it up and paying the price if the ship arrived within the ninety days makes it clear that they never were to have it without paying the price. The bill of lading appears to be treated as the evidence of the shipment, and on this being forthcoming the ninety days was to begin to run. The reference to payment "three days before maturity" is, in the translation in the record, a little perplexing, but is not material on any question in this appeal. It is probably to be explained by the fact that it was anticipated—though it does not seem to have been obligatory—that a bill of exchange would be given, and that it was meant that the credit should only be for ninety days, and that if a bill of exchange carrying days of grace was given it was to be taken up three days before the maturity of that bill. Days of grace have been abolished in Germany, but not in Holland.

On October 19 an invoice was sent by the sellers to the buyers for the price of the cargo (21,938*l.* 9*s.*), which was stated on the invoice to be due December 9, 1914, and this would be ninety days beginning with September 10. The invoice was accepted without objection by the buyers. This was the state of things when on December 6, 1914, the *Parchim* was detained at Plymouth and the cargo captured; but the fact of the capture was not known to the appellants on December 9, the due date for payment of the price. On that day the bank held the first and second of each of the sets of bills of lading, but not the third, and the buyers, conceiving themselves entitled to have all three bills of lading, deposited the whole of the price (21,938*l.* 9*s.*) with the bankers, but instructed them not to part with the money until they got the third bill of lading. The bankers accepted these instructions. They got the third bill of lading by January 25, and on that day they handed the money to the sellers and all the documents to the buyers.

The construction which their Lordships put on the somewhat ambiguous clause of the contract which mentions receipts of the bill of lading without saying whose receipt of it is referred to is this: The sailing ship coming round Cape Horn was estimated to take ninety days longer than the mail by which the first bill of lading, posted immediately after the completion of her shipment, would

arrive in Europe. The buyer was to pay for the cargo at the estimated date of the arrival of the ship, or on her arrival if she arrived earlier than expected. Therefore the ninety days' credit was to begin to run when the buyer had been satisfied by production of the first bills of lading that the cargo had been shipped and that the vessel might reasonably be expected in a further ninety days. Then, at any rate, if not before, he certainly came under a positive obligation to pay the price. He was, however, only to have the bills of lading when he did pay. The goods then most certainly were at his risk, and he had an insurable interest whether he had the property or not. He was entitled to have the policy whenever he chose to pay the premium. It appears that he did deposit the amount of the premium at the same time as he deposited the price on December 9. If the goods did not arrive, his remedy, if any, was on the policy. The bank which held the bills of lading was the bank of the sellers, but it was at Amsterdam, not in the country of the sellers, but of the buyers. The course of business is left somewhat in doubt by the words used in the contract; probably the translation is not a very good one, or the document is on a form which has not been very skilfully filled up and altered, but the meaning is fairly clear, and it is made quite clear by the conduct of the parties. It seems to be that the bankers were to hold the documents, as it were, in medio. On the one hand they were not to hand them over to the buyers without the money, but equally, as their Lordships infer, they were to hold them until the due date, and not hand them back to the sellers unless and until the buyers made default in taking them up according to the contract. The giving of a guarantee has been relied on in the argument, but it does not appear of great importance, and the fact that before the contract was signed a larger guarantee had been asked for and not insisted on is not a fact admissible for the purpose of construing the contract.

On these facts the learned President, possibly drawing somewhat different inferences, held that on December 6, the date of the capture, the property in the cargo remained in the German sellers owing to the form of the bill of lading and to the fact that, although indorsed in blank, it was still in the hands of the sellers' bankers with instructions not to hand it over to the buyers until the price was paid. His view was that in this state of things there was a jus

J. C. 1917 THE PARCHIM.

disponendi reserved by the sellers which prevented there being an unconditional appropriation of the goods by their shipment. But that this is a very nice point, on which opinions may easily differ, is shown by the fact that in *The Sorfareren* (1), the case which came before this Board on appeal immediately before this present case, the learned President had himself come to the contrary conclusion on a contract which appears quite as favourable to the sellers as the contract in the present case. In *The Sorfareren* (1) a compromise was agreed to between the Crown and one set of claimants, which made it unnecessary for this Board to form an opinion on this point in that appeal. The question now to be considered is whether the learned President in the present case gave as much effect as he ought to have to the fact that there was here a contract for the sale of the whole cargo of a named ship, and that that cargo was clearly at the risk of the buyers from a time anterior to the capture.

According to the authorities, it is beyond doubt that the fact that the cargo was at the buyers' risk from the moment it was placed on board points to the property having been intended to pass at that time. The general principle subsequently embodied in the Sale of Goods Act, 1893, s. 20, was as early as 1873 laid down by Blackburn J. in *Martineau* v. *Kitching* (2), where he says: "As a general rule, res perit domino, the old civil law maxim, is a maxim of our law; and when you can shew that the property passed the risk of the loss, prima facie, is in the person in whom the property is. If, on the other hand, you go beyond that, and shew that the risk attached to the one person or the other, it is a very strong argument for shewing that the property was meant to be in him. But the two are not inseparable. It may be very well that the property shall be in the one and the risk in the other." It is true that in that same case and in others there are dicta of judges that an express clause stating at whose risk the subject-matter is to be at any particular time is to be construed as indicating that at that time the property is in some one else, otherwise the clause would be unnecessary; but that is an application of the maxim expressio unius, and the point does not arise in the present case. There is here no express clause dealing with the risk; it is on the whole tenor of the contract that it appears

(1) (1915) 1 Br. & Col. P. C. 589.

(2) (1872) L. R. 7 Q. B. 436, 453, 454.

that the goods are at the buyers' risk after shipment, as they then become bound to pay the price at the end of an agreed period of credit. This fact is a strong argument, as Blackburn J. says, to show that it was meant that the property should then pass. Further, there is here a contract for the sale of the whole cargo of a named ship on a particular voyage. The cargo was not on board, so that when the contract was made it was a contract for the future sale of a sufficient but then unascertained part of the bulk then at the disposal of the seller and ready for shipment. *Anderson* v. *Morice* (1) was a case in many respects like this, and what was said by the judges is instructive, although there are sufficient differences in the facts to prevent the decision there being an authority here. There the plaintiff had bought "the cargo of . . . . Rangoon rice per *Sunbeam*, at 9*s*. 1½*d*. per cwt., cost and freight. . . . . Payment by sellers' draft on purchasers at six months' sight, with documents attached." There, as here, the cargo was not on board at the time of the contract, and the ship was lost during the loading, when the greater part of the rice to make up the cargo was on board, but not the whole; the part not shipped was alongside in lighters, and was also lost. The contract did not, as the contract in the present case does, contain any clause providing for the case of a loss during loading. The question, on which there was considerable difference of opinion, was as to whether the part of the cargo which was on board was at the risk of the purchaser so as to give him an insurable interest. It was held that neither the property nor the risk passed as each bag of rice was put on board, and that neither passed until completion of the loading. Every judge, however, was of opinion that the property, as well as the risk in the whole cargo, would have passed as soon as the loading was complete; but there the phrase "with documents attached" showed that the purchaser was to have the bill of lading as soon as made out on his accepting the draft to be tendered with it for his acceptance. If the clause as to part loading, which is in the present case, had been in that contract, the purchaser would have had both property and risk in the part on board. In cases such as that was, and such as this is, as soon as a full cargo has been shipped the particular bags on board become

(1) (1874) L. R. 10 C. P. 58; (1875) L. R. 10 C. P. 609; (1876) 1 App. Cas. 713.

J. C. 1917 THE PARCHIM.

ipso facto the cargo of the ship, and thereby become the subject-matter which has been agreed to be sold. The sellers' representatives here were clearly authorized to select the particular bags of the description in the contract which were to go on board; no question arises here of the description and quality, as the certificates and analysis when tendered were accepted, a small rebate being made in respect of a slight variation which appears to have been justified by the contract; at any rate, it was not objected to. The shipment under such circumstances seems such an unqualified and decisive appropriation that it would require something very clear and express in the way of a reservation to make the appropriation a conditional one.

The English cases, however, on which the Sale of Goods Act was founded seem to show that the appropriation would not be such as to pass the property if it appears or can be inferred that there was no actual intention to pass it. If the seller takes the bill of lading to his own order and parts with it to a third person, not the buyer, and that third person, by possession of the bill of lading, gets the goods, the buyer is held not to have the property so as to enable him to recover from the third party, notwithstanding that the act of the seller was a clear breach of the contract: *Wait* v. *Baker* (1); *Gabarron* v. *Kreeft*. (2) This seems to be because the seller's conduct is inconsistent with any intention to pass the property to the buyer by means of the contract followed by the appropriation. On the other hand, if the seller deals with the bill of lading only to secure the contract price, and not with the intention of withdrawing the goods from the contract, he does nothing inconsistent with an intention to pass the property, and therefore the property may pass either forthwith subject to the seller's lien or conditionally on performance by the buyer of his part of the contract: *Mirabita* v. *Imperial Ottoman Bank* (3); *Van Casteel* v. *Booker* (4); *Browne* v. *Hare* (5); *Joyce* v. *Swann*. (6) The prima facie presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract and not forthwith subject to the seller's lien. Inasmuch, however, as the object to be

(1) 2 Ex. 1.
(2) (1875) L. R. 10 Ex. 274.
(3) (1878) 3 Ex. D. 164.
(4) (1848) 2 Ex. 691.
(5) (1858) 3 H. & N. 484.
(6) 17 C. B. (N.S.) 84.

attained, namely, securing the contract price, may be attained by the seller merely reserving a lien, the inference that the property is to pass on the performance of a condition only is necessarily somewhat weak, and may be rebutted by the other circumstances of the case.

Having regard to the doctrine that the master of a ship who gives to the shipper of goods a bill of lading becomes bailee of the goods to the person indicated by the bill of lading, a seller holding a bill of lading to his order would have a sufficient possession of the goods to maintain his lien, even if he had on shipment parted with the property. The seller in such a case makes the ship (even if it belongs to the buyer or is chartered by him) his warehouse so far as these goods are concerned, and the case, as pointed out by Pollock C.B. in *Browne* v. *Hare* (1), is to be governed by the same rules as that of a person contracting to buy goods in a warehouse of the seller where they are to remain until paid for, so that the seller retains a lien. They may or may not become the buyer's property before he pays for them, according to the terms of the contract. The question whether, assuming the appropriation by shipment of the cargo to be unconditional, the property passed then, or only on notification of the appropriation, to the buyers is not material in the present case, as on September 9 by the bills of lading and on October 19 by the invoice there was before the capture clear notification. The learned President in his judgment put out of consideration the events of September 9 and October 19 on the ground that they took place after the outbreak of war, but in so doing he seems to have overlooked his own decision in *The Southfield* (2), and that of this Board to which he was a party in *The Daksa* (3), to the effect that acts done after the outbreak of war are not invalidated when done in pursuance of obligations incurred before the war.

Their Lordships have come to the conclusion, after carefully considering all the facts, that it was the intention of the parties to the contract that the property in the cargo should pass to the buyer upon shipment, but that the buyer was not intended to have possession of the cargo, or of the bills of lading which represented the

(1) 3 H. & N. 484. (2) [1917] A. C. 390, n.
(3) [1917] A. C. 386.

J. C. 1917 — THE PARCHIM.

cargo, until actual payment at due date of the purchase price. With the exception of the form of the bills of lading, everything points to this conclusion. The contract is for the sale of the whole cargo of a named ship. On shipment, or at any rate on notification of shipment, the cargo is at the risk of the buyer, who has to pay for it whether it arrives or not. The cargo is to be insured for buyer's account and benefit and insured at its arrived value, including profit, which the buyer alone could make. The buyer takes over the charterparty and names the port of discharge. The only matter which seems to point to an intention not to pass the property on shipment is the form in which the bills of lading were taken. But this form was determined by the seller's agent without knowledge of the contract, and though it may have been determined on general instructions from his principal, without particular instructions given in view of the particular contract. The way in which the seller subsequently deals with the bills of lading points rather to a desire to support his lien than to a desire to retain the property or any jus disponendi incident to the property. As soon as the bills of lading arrive in Europe he places them at the buyer's disposal, subject only to payment of the purchase price at due date. As soon as this is done he loses the possibility of withdrawing them from the contract, even if otherwise he could have done so. Under these circumstances the form of the bills of lading is, in their Lordships' opinion, quite insufficient to displace the strong inference of an intention to pass the property on shipment arising from the terms of the contract and the other facts.

It remains only to deal with the question of insurance, as to which a point was rather hinted at than seriously pressed in the argument. The appellants no doubt consented to take the risk which they did on this contract because they were to be insured against, inter alia, war risks. The appellants may have been entitled to recover on the policy, but as the policy itself is not in evidence, but only the contract for it, their Lordships cannot be certain of this. It may be that the appellants have been paid by the underwriters, who are said to have been Germans, but there is no proof of the payment. No question was asked about it of the witness who gave evidence for the appellant at the trial. Possibly counsel considered that the Prize Courts are not concerned with

questions of insurance, because insurances are collateral contracts not affecting the property in goods. J. C. 1917 THE PARCHIM.

It may be that had it been proved in fact that the appellants had been paid by the insurers, and that the appeal was being prosecuted for the benefit of the insurers, who were enemies, a further question would have arisen, but there is no such proof, and their Lordships express no opinion on this point.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed with costs, and that the cargo be released to the appellants.

Solicitors for appellants: *Stokes & Stokes.*
Solicitor for respondent: *The Treasury Solicitor.*

[PRIVY COUNCIL.] J. C.*

THE BARON STJERNBLAD. 1917 Nov. 22.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Goods—Continuous Voyage—Successful Claimant—Costs and Damages—Circumstances of Suspicion.

When contraband goods consigned to a neutral port have been seized as prize on the ground that they have an ultimate enemy destination, the existence of an extensive trade by the re-export of similar goods, or products thereof, from the neutral country to an enemy country is of itself such a circumstance of suspicion as disentitles a successful claimant from recovering costs or damages.

APPEAL from a judgment of the President of the Admiralty Division (in Prize) delivered on November 27, 1916.

The Danish steamship *Baron Stjernblad* while on a voyage from Lisbon to Copenhagen was detained at North Shields, and on April 18, 1916, 3000 bags of cocoa, forming part of her cargo, were there seized. The goods were consigned from Lisbon under bills of lading making them deliverable at Gothenburg to the order of the appellants, a Swedish corporation carrying on business at Stockholm as manufacturers of cocoa and chocolate.

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, LORD WRENBURY, and SIR ARTHUR CHANNELL.

J. C. 1917

THE BARON STJERNBLAD.

On May 26 the appellants applied to the Procurator-General for the release of the goods, and on July 10 sent to him an affidavit by their managing director. The affidavit stated that the goods had been bought and paid for by the appellants and were at all times intended exclusively for consumption in the appellants' factory at Stockholm. Documents were exhibited to the affidavit, including a copy of the contract of purchase, invoice, bills of lading, policies, a declaration of consumption, and extracts from the appellants' books relating to the purchase.

A writ was issued on July 13 claiming condemnation of the goods as contraband. On July 17 the appellants filed a claim supported by the affidavit above mentioned. On August 4, under an order of the Court, the evidence of the financial director of the appellants was taken before the Registrar. He gave evidence as to the requirements of the appellants' factory, which he stated exceeded the quantity of cocoa which had been obtained from Lisbon, though he admitted that he had ordered a quantity which exceeded the pre-war requirements.

On behalf of the Procurator-General affidavits were filed testifying to the facts, stated in the judgment of their Lordships, as to consumption of cocoa in Germany and the figures showing that since the outbreak of war cocoa imported into Sweden had been re-exported to Germany in large quantities.

The action was heard by the President on November 27, 1916, when the appellants claimed the release of the goods and the costs, damages and expenses which they had incurred by reason of the seizure and detention. The Attorney-General at the conclusion of the case did not press for the condemnation of the goods, but contended that there were circumstances of suspicion which disentitled the appellants from recovering costs, damages or expenses.

The learned President ordered the goods to be released, but rejected the claim for costs, damages and expenses. He was of opinion that there was reasonable ground for the seizure, and that, having regard to various facts of the case, the Procurator-General was justified in proceeding to the final hearing.

1917. Oct. 29, 30. *Sir Erle Richards, K.C.*, and *Balloch*, for the appellants, argued to the effect appearing from the judgment of

their Lordships. Reference was made to Pratt's Story on Prize Courts, p. 4; *The Ostsee* (1); Declaration of London, art. 64 and report; also (at the request of the Board) to *The Bermuda* (2), *The Springbok* (3), and *The Peterhoff.* (4)

Sir Frederick Smith, A.-G., and *Stuart Bevan*, for the Crown, referred to *The Ostsee* (1) and *The Balto.* (5)

Balloch replied.

Nov. 22. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. On April 18, 1916, His Majesty's officer of Customs at the port of North Shields seized as prize 3000 bags of cocoa beans on board the Danish steamship *Baron Stjernblad*, the ground of seizure being that the goods were contraband of war.

It is not disputed that cocoa beans are contraband, but by the bills of lading the 3000 bags in question were deliverable to the appellants at Gothenburg, a neutral port, and the only question, therefore, was whether, beyond their ostensible destination at Gothenburg, they had a further or ultimate destination in an enemy country. The President decided on the evidence that they had not, and ordered their release to the appellants, but he refused to allow the appellants any damages or costs, and the present appeal is from this refusal.

The law on the subject is reasonably certain. It is clearly stated in the letter of Sir William Scott and Sir John Nicholl, printed pp. 1-11 of Pratt's edition of Mr. Justice Story's Notes on the Principles and Practice of Prize Courts, and in the case of *The Ostsee.* (1) If there were no circumstance of suspicion, or, as it is sometimes put, "no probable cause" justifying the seizure, the claimant to whom the goods are released is entitled to both costs and damages. If, on the other hand, there were suspicious circumstances justifying the seizure, the claimant is not entitled to either costs or damages. The reason is clear. It would be obviously unjust to compel a belligerent to pay damages or costs where he has done nothing in excess of his belligerent rights, and those rights justify a seizure of neutral property when it is in nature contraband and there is reasonable

(1) (1855) 9 Moo. P. C. 150.
(2) (1865) 3 Wall. 514.
(3) (1866) 5 Wall. 1.
(4) (1866) 5 Wall. 28.
(5) [1917] P. 79.

J. C. 1917

THE BARON STJERNBLAD.

suspicion that it has an enemy destination. This may be thought hard upon the neutral owner, who will not be fully indemnified by a mere release of his property. So it is; but war unfortunately entails hardships of various kinds on neutrals as well as on belligerents. It follows that the real question to be decided on this appeal is whether, when the goods were seized, there were circumstances of suspicion justifying the seizure.

Some stress was laid by counsel for the appellants on the examples given by Sir William Scott and Sir John Nicholl in the letter above referred to of the circumstances under which seizure would be justified. All of them no doubt relate to suspicion arising either on the ship's papers or by reason of something done or omitted on the part of the master or crew. Their Lordships do not think that the writers of the letter intended their list of examples to be exhaustive, and it must be remembered that they wrote before the doctrine of continuous voyage had been applied either to contraband or to blockade. It is clear that the ultimate as opposed to the ostensible destination of goods would seldom, if ever, appear on the ship's papers or be within the knowledge of the master or crew. It would have to be proved or inferred from other sources, and it could hardly be contended that if the Crown were in possession of evidence obtained from such other sources from which an ultimate destination in an enemy country could be inferred as reasonably probable, the seizure of the goods would not be justified.

The appellants further contended that in considering whether there were circumstances of suspicion which justified the seizure the Court must confine its attention to those circumstances for which the owner of the property seized is in some way responsible, and cannot take into consideration circumstances the existence of which is not due to any act or omission on the part of such owner or his agents or employees. Before considering this contention their Lordships think it better to state shortly the several facts on which the Crown relies as raising a reasonable suspicion that the 3000 bags in question had an ultimate destination in Germany.

Cocoa and chocolate are important foodstuffs. Both are manufactured from cocoa powder, itself the product of the cocoa bean. In manufacturing cocoa powder cocoa fat is also produced, and from cocoa fat glycerine is easily made, and this can be readily

converted into nitro-glycerine, an essential ingredient in many high explosives. Thus 100 tons of cocoa beans give about 60 tons of cocoa powder and 25 tons of cocoa fat, which last will yield $2\frac{1}{2}$ tons of glycerine, and $2\frac{1}{2}$ tons of glycerine can be converted into 6 tons of nitro-glycerine.

Prior to the war Germany was importing annually about 55,000 tons of cocoa beans; this was approximately one-quarter of the world's annual production. The outbreak of war cut her off from nearly 85 per cent. of her supply. The result was serious. In spite of the measures taken by the German Government to obtain supplies from other sources, to secure economy and to regulate distribution, prices rose rapidly until by March, 1916, the price of cocoa in Berlin was eight or nine times its price in London. Under these circumstances there was every inducement to neutrals, and in particular to the neighbouring Scandinavian countries, to develop an export trade in cocoa beans or their products to the German Empire.

Turning now to Sweden, their Lordships find that prior to the war the imports of cocoa beans into Sweden were between 1600 and 1700 tons only annually. There was no re-export trade to Germany. Since the outbreak of hostilities imports of cocoa beans into Sweden have increased tenfold, and a re-export trade to Germany has been developed. During the first year of the war such re-export trade amounted to over 1200 tons, it being the regular practice to ship cocoa beans to Gothenburg in Danish steamers and to re-ship them thence to Germany. Besides this the imports of cocoa into Sweden have since the outbreak of the war largely increased, and there has developed a considerable export trade from Sweden to Germany in cocoa powder, cocoa, chocolate, and cocoa fat, an export trade which was non-existent before the war. The fact that before the war Sweden imported cocoa and chocolate from Germany, and since the war has been unable to do so, has little bearing on the inference suggested by the circumstances to which their Lordships have referred.

The position is therefore this. If the shipments of cocoa beans to Sweden be considered collectively, a considerable portion thereof must be destined for or find its way into Germany, either by the re-export to Germany of the beans themselves or by the export to

J. C. 1917

THE BARON STJERNBLAD

Germany of the various products of the beans. It must be remembered that in *The Balto* (1) it was decided that an intention to export to an enemy country the manufactured products of imported raw material might bring a case within the doctrine of continuous voyage. The decision is not binding on this Board, but the appellants' counsel did not ask their Lordships to review it or question its validity in law. The appellants thus belong to a class of importers, some of whom must be engaged in a contraband trade, while others may not. It is impossible in any particular case to avoid suspicion or to predicate with regard to any particular importer that his intention is innocent.

But the matter does not stop there. It is not improbable that in the case of a reputable Swedish merchant His Majesty's Procurator-General might accept his assurance or guarantee that neither the beans in question nor their products were intended for export to Germany, but would be consumed in Sweden. But here, unfortunately, a difficulty is raised by the Swedish War Trade Law of April, 1916. According to that law it is unlawful for a Swedish subject to give any such assurance or guarantee without the consent of the Swedish Executive, and the Executive refuses to allow Swedish subjects to give any such assurance or guarantee with regard to the products of imported raw material. This law, or at any rate the way in which it is administered, has already on several occasions proved prejudicial to the proper determination in the Prize Court, according to international law, of questions arising between the Crown and Swedish subjects. Only the other day the President struck out a claim on the ground that the claimant, a Swedish subject, refused, under order of his Government, to give the discovery which had been ordered by the Prize Court, and their Lordships' Board felt unable to advise His Majesty to give leave to appeal from the President's decision. It is quite impossible for a Prize Court administering international law to accept the dictates of any municipal law as to what discovery ought or ought not to be insisted on either generally or in any particular case. The Prize Court can, however, protect itself, but this is not so with the Swedish subject. He is in a dilemma. Either he must act in contempt of the order of the Prize Court and so lose his case, which may be a perfectly

(1) [1917] P. 79.

good one, or he must prove his case to the Prize Court, and in so doing incur penalties under his own municipal law. The position is anomalous, but the anomaly is certainly not due to any defect in the practice of the Prize Court or in the law which it administers.

It appears that the assurance or guarantee given by the appellants prior to the seizure of the goods in question went only to the consumption in Sweden of the raw material, and said nothing about its products. It was only in the course of the subsequent proceedings before the Prize Court, when one of the directors of the appellant firm was examined orally, that evidence was adduced on this point, and this evidence, though accepted by the President as satisfactory, was not, in their Lordships' opinion, so conclusive as to make it unreasonable for the Crown to bring the case to trial. For example, it does not appear how the appellants dispose of the cocoa fat produced in the manufacture of cocoa or chocolate from the cocoa beans.

Their Lordships therefore conclude that, looking at all the known facts from the common-sense point of view, there were circumstances of suspicion calling for further inquiry, and amply sufficient to justify the seizure, so that the only remaining question on this part of the case is whether the appellants are right in their contention that these facts, or some of them, ought to have been disregarded altogether, because their existence was not due to any action or omission for which the appellants could be held responsible.

Their Lordships are of opinion that this contention is wholly untenable. The question in every case is whether circumstances of suspicion exist, and not who is responsible for their existence. Thus the fact that documents are destroyed when search is imminent is a suspicious circumstance irrespective of the person responsible for the destruction, and whether this person acted on the instructions, or in the presumed interest, of the cargo owners or otherwise. Indeed, in the present case the question how far the appellants were responsible for the growth of the export trade from Sweden to Germany in cocoa beans or their products was precisely one of the questions requiring investigation, and would be of the utmost materiality in determining the ultimate destination of the goods in question. If responsibility has anything to do with it, it would seem that the appellants were responsible for the absence of any

J. C. 1917

THE BARON STJERNBLAD.

assurance or guarantee as to the products of the goods, although their omission in this respect was due to observance of their own municipal law; and further, a neutral cargo owner would appear to be quite as responsible for the actions of his own Government as he is for the action of the master or crew of the vessel on which the cargo is shipped.

There are two further points which require notice. It was contended that at any rate after August 4, 1916, the date when the oral evidence above referred to was taken, the Crown ought to have consented to a release of the goods. In their Lordships' opinion the Crown was amply justified in bringing the matter to trial. It was also urged that the Crown had improperly delayed the trial. Their Lordships see no evidence of this. The trial took place on November 27, 1916, the seizure having been made on April 16, 1916. This does not appear an unreasonable interval, having regard to the heavy work of the Prize Court and the importance of the questions at issue. In any case, questions as to delay are eminently a matter for the President to deal with, and their Lordships could only interfere with his decision in very exceptional cases.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Botterell & Roche.*
Solicitor for respondent: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

IMPERIAL TOBACCO COMPANY (NEWFOUNDLAND), LIMITED . . . . . } APPELLANTS;

AND

DUFFY . . . . . RESPONDENT.

J. C.* 1917 Dec. 4.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Newfoundland—Trade Mark—Infringement—Registration in Newfoundland—Prior Registration in United States—User—Newfoundland Trade Marks Act (Newfoundland Consolidated States, second series, ch. 112), ss. 2, 31.

The appellants in 1910 adopted and had since used in Newfoundland a certain trade mark in connection with tobacco. In 1915 they found that the respondent was importing into and selling in Newfoundland tobacco bearing a similar mark. They thereupon registered their trade mark under the Newfoundland Trade Marks Act, and commenced an action against the respondent for infringement. The trade mark upon the imported tobacco had been used in the United States from 1896 and it was "protected by law" in the United States, within the meaning of s. 2 of the above-mentioned statute. The appellants when they adopted their trade mark were ignorant of the existence of the other trade mark:—

Held, that the appellants were properly registered in Newfoundland in respect of their trade mark, and were entitled to an injunction against the respondent.

APPEAL from a judgment of the Supreme Court of Newfoundland (June 1, 1916) affirming a judgment of Johnson J. (March 25, 1916).

The appellants sued the respondent for infringement of their trade mark, which was registered under the Newfoundland Trade Marks Act (Consolidated Statutes of Newfoundland, 2nd series, ch. 112), claiming an injunction and further relief.

The facts appear from the judgment of their Lordships.

Johnson J. dismissed the action, holding that the respondent's mark being protected by law in a country which was a party to the International Convention and to which s. 103 of the Patents, Designs,

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD WRENBURY.

J. C. 1917 IMPERIAL TOBACCO COMPANY (NEWFOUNDLAND) v. DUFFY.

and Trade Marks Act, 1883, applied, its use in Newfoundland could not be restrained.

The decision was affirmed by the Full Court (Horwood C.J., Johnson J., and Kent J.).

1917. Nov. 2. *Walter, K.C.*, and *Sebastian*, for the appellants. *Kerby, K.C.*, and *F. G. Underhay* (for *E. Russell Clarke*, serving with His Majesty's Forces), for the respondent.

Reference was made to the Newfoundland Trade Marks Act, ss. 1, 2, 3; s. 4, sub-s. 3; ss. 19, 24, 31; the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), ss. 62, 103, 104; *Collins Co.* v. *Brown* (1), and *In re Munch's Application*. (2)

Dec. 4. The judgment of their Lordships was delivered by

LORD WRENBURY. The appellants are a company incorporated in Newfoundland and are dealers in tobacco. In 1910 they adopted and have ever since used upon tobacco which they placed upon the Newfoundland market a trade mark consisting of a representation of a clover leaf, describing the goods as the "Clover" brand. In May or June, 1915, the appellants found that the respondent was importing into and selling in Newfoundland tobacco which he bought from Messrs. Larus & Brother Company, a company incorporated in Virginia, United States of America, which bore a similar trade mark, and was described as "Clover Leaf" tobacco. Thereupon, on June 21, 1915, the appellants registered their trade mark in Newfoundland and commenced this action, claiming an injunction to restrain the respondent from infringing the plaintiffs' trade mark.

Larus & Brother Company had for many years, from 1896 or thereabouts, used in the United States a trade mark for tobacco similar to the plaintiffs' mark.

It was protected by law in the United States within the meaning of s. 2 of the Newfoundland Trade Marks Act, ch. 112 of the Newfoundland Consolidated Statutes (second series), and of s. 3 of the Merchandise Marks Act, 1887. They had not before 1915 used it in Newfoundland. The plaintiffs, when they adopted their mark, were in ignorance of the existence of the Larus mark in the United States.

(1) (1857) 3 K. & J. 423. (2) (1883) 50 L. T. 12.

The question for decision is whether the defendant, by extending to Newfoundland a user which prior to 1915 had been confined to the United States, was infringing the plaintiffs' trade mark in Newfoundland. This has to be decided upon a consideration of the Newfoundland Act, ch. 112, and in particular of s. 2 of that Act.

The definition of " trade mark " in s. 2 is in the following words :— " The expression ' trade-mark ' means a trade-mark registered in the register of trade-marks kept under the provisions of this chapter, and includes any trade-mark which, either with or without registration, is protected by law in any British possession or foreign State, to which the provisions of the one hundred and third section of the Imperial ' Patents, Designs, and Trade Marks Act, 1883,' are under Order in Council for the time being applicable."

In their Lordships' opinion the antecedent to which the word " which " in the context " to which the provisions . . . ." is to be referred is " British Possession or foreign State " (which is the last antecedent), and not " trade-mark," mentioned earlier in the section. Sect. 103 of the Act of 1883 had provided by sub-s. 4 that the provisions of that section " shall apply only in the case of those foreign States with respect to which Her Majesty shall from time to time by Order in Council declare them to be applicable." It is to these words that s. 2 of ch. 112 is referring.

Her Majesty had by Order in Council in 1887 declared that the provisions of s. 103 should be applicable to the United States.

It results that for the present purpose s. 2 of ch. 112 may be read as providing that the expression " trade-mark " in ch. 112 includes any trade mark which either with or without registration is protected by law in the United States. It therefore includes the defendant's mark. From this the defendant argues that the plaintiffs are, under s. 1 of ch. 112, committing a criminal offence by using the trade mark or selling under the trade mark in Newfoundland, and that they cannot in such circumstances be entitled to any injunction from the Court.

The Newfoundland statute is undoubtedly ill-expressed. It has taken two Imperial statutes, that of 1883 and that of 1887, and by combining the provisions of the latter as to fraudulent marks with the provisions of the former as to registration and protection, and

J. C.
1917
IMPERIAL TOBACCO COMPANY (NEWFOUNDLAND). v. DUFFY.

giving in each case by definition the same meaning to "trade mark," has produced the difficulty which has in the present case to be resolved.

It is plain that the plaintiffs being on the register in Newfoundland are under s. 31 of ch. 112 entitled to sue to restrain infringement. And their Lordships are unable to accede to the argument that in using in Newfoundland their own trade mark the plaintiffs are so acting as to commit any offence within s. 1 of ch. 112. The plaintiffs are not forging the defendant's mark. They are using their own. They are not falsely applying to goods any trade mark so as to be calculated to deceive. They are by the mark indicating, as they had done for five years, that the goods are theirs.

Further, the plaintiffs are rightly on the register. It is strange, but it is the fact, that the Newfoundland statute contains no provisions for rectification of the register. Under these circumstances the defendant cannot, of course, be blamed for not taking proceedings for rectification. But it might be a defence to an action for infringement that the plaintiffs are not duly on the register. Assuming, however, this to be so, their Lordships hold that the plaintiffs are duly on the register. The definition in s. 2 confers no rights in respect of a trade mark. The rights are to be found elsewhere. Under ss. 19 and 24 a proprietor is entitled to be registered. The plaintiffs availed themselves of those rights. They had, as was found by the trial judge, adopted their mark in 1910 in ignorance of the existence in the United States of the defendant's mark, and in 1915 they registered it, as they were entitled to do. The ground of the judgment of Johnson J. is that the defendant has not used the plaintiffs' device. With this their Lordships cannot agree. If the words are intended to convey that the defendant while using the same pictorial representation was using it in his own right and not in breach of the plaintiffs' right, the answer is that he is not entitled to do so. The words cannot mean that the defendant has not used the same pictorial representation. It is common ground that he has.

The judgment of Horwood C.J. is rested on the ground that the Larus mark is admittedly protected by law in the United States, and that consequently no action is maintainable by the appellants against the respondent for the acts complained of. For the reasons

already assigned their Lordships do not find that the premiss supports the conclusion.

For these reasons their Lordships are of opinion that the appeal must be allowed, an injunction granted as asked, and the respondent ordered to pay the costs here and in the Court of first instance and Court of Appeal, and they will humbly advise His Majesty accordingly.

Solicitor for appellants: *Hon. F. F. Macnaghten.*
Solicitors for respondent: *Regge & Ackroyd.*

[HOUSE OF LORDS.]

MOORE AND ANOTHER . . . . . APPELLANTS;

AND

EVANS . . . . . RESPONDENT.

Insurance—Policy on Jewellery—"Loss damage or misfortune"—Consignment Abroad on Sale or Return—Outbreak of War with Country of Consignee—Inability of Consignee to deal with Goods—Loss under Policy.

A London firm of jewellers insured their stock of jewellery by a non-marine policy for a year from January 8, 1914, against "loss of and/or damage or misfortune to" the goods or any part thereof arising from any cause whatsoever whilst the goods were in the United Kingdom or any country in Europe or in transit from any port in the United Kingdom or Europe to any other port in the United Kingdom or Europe (with certain exceptions).

In June and July, 1914, they consigned certain pearls so insured to trade customers in Frankfort-on-Main and Brussels on sale or return on the terms that the pearls remained the property of the consignors until invoiced by them. In the ordinary course of business jewellery so sent on approval remained with the consignee for a limited period to give him an opportunity of selling it. Owing to the outbreak of war between Great Britain and Germany on August 4 and the occupation of Brussels by the Germans in the same month it became impossible for the consignors to recover possession of the pearls. There was no evidence that the pearls had been seized or specifically interfered with by the German authorities. As

* *Present:* LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD PARMOOR, and LORD WRENBURY.

H. L. (E.)
1917
MOORE
v.
EVANS

to the pearls sent to Frankfort, there was no evidence that they had not remained in the possession of the consignees; and as to the pearls sent to Brussels, the consignees had, with the subsequent assent of the consignors, placed them in a bank there for safe custody, and there was no evidence that they had not remained in the bank:—

Held that, the policy being on goods and not on an adventure, the evidence did not establish a loss under the policy.

Dictum of Bailhache J. in *Mitsui* v. *Mumford* [1915] 2 K. B. 27, 31, considered.

Decision of the Court of Appeal [1917] 1 K. B. 458 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Rowlatt J. (2)

In June and July, 1914, the appellants, Messrs. Moore & Gallop, who carried on business in London as dealers in jewellery and precious stones, sent certain valuable pearls on sale or return to Germany and Belgium. By reason of the war between Great Britain and Germany the pearls had not been returned. The question for determination was whether the appellants had suffered loss within the meaning of a policy of insurance whereby the appellants were insured against loss resulting from the loss of or damage or misfortune to jewellery from any cause whatever. The policy was issued on January 8, 1914, by a group of Lloyd's underwriters of whom the respondent was one.

The facts are fully stated in the judgment of Lord Atkinson and are summarized in the head-note.

In February, 1915, the appellants brought an action against the respondent, as well on his own behalf as on behalf of all the underwriters at Lloyd's, to recover the loss alleged to have been sustained by them under the policy.

Rowlatt J. gave judgment for the appellants, but his decision was reversed by the Court of Appeal (Swinfen Eady L.J., Bankes L.J., and Lawrence J.), who held that the appellants had failed to prove a loss within the meaning of the policy.

1917. July 10, 12, 13. *Leslie Scott, K.C.*, and *Douglas Hogg* (with them *C. Gallop*), for the appellants. The perils insured against by this policy are "loss, damage or misfortune." "Damage"

(1) [1917] 1 K. B. 458. (2) [1916] 1 K. B. 479.

means an actual impairment of the thing insured. "Misfortune" is something different from and less than damage or loss and may be defined as an untoward event which cannot ordinarily be guarded against: see Stroud's Judicial Dictionary. There must be a misfortune to the goods resulting in damage to the assured. The Court of Appeal have given no meaning to "misfortune." The appellants claim as for a total loss. A total deprivation of possession constitutes in any class of insurance a total loss, and a detention of the goods for such an indefinite time as the duration of a great war is in a business sense a total deprivation of possession. The evidence shows that these goods are uninsurable. The appellants do not contend that the law of marine insurance is applicable to this case, but certain broad principles of insurance which are illustrated by the law of marine insurance are applicable. There is a definite analogy between cases of insurance on a ship and this class of insurance: *Mitsui* v. *Mumford* (1); *Campbell & Phillips, Ld.* v. *Denman.* (2) It is conceded that this is an insurance on the goods as things, and not on the venture, but the notion of the frustration of the venture in the case of an insurance on a ship, as distinguished from the goods on the ship, has long been definitely abandoned, and cases on insurance on ships are relevant in considering whether there has been a loss of the thing and whether the loss has been caused by a peril insured against: *Goss* v. *Withers* (3); *Hamilton* v. *Mendes* (4); *M'Iver* v. *Henderson* (5); *Cologan* v. *London Assurance Co.* (6); *Holdsworth* v. *Wise* (7); *Roux* v. *Salvador* (8); *Shepherd* v. *Henderson* (9); *Cory* v. *Burr* (10); *Lozano* v. *Janson* (11); *Wilson* v. *Jones.* (12) These cases substantiate the proposition that where the assured is deprived of the possession and control of the goods in a commercial sense that is a total loss, and that it is immaterial to say that in the eye of the law there is a right to possession, or that the goods are in the hands of a person who after the war may be made accountable to the assured. The necessity for a notice of abandonment in the case of a construc-

(1) [1915] 2 K. B. 27.
(2) (1915) 21 Com. Cas. 357.
(3) (1758) 2 Burr. 683.
(4) (1761) 2 Burr. 1198, 1209; 1 Wm. Bl. 276.
(5) (1816) 4 M. & S. 576.
(6) (1816) 5 M. & S. 447.
(7) (1828) 7 B. & C. 794.
(8) (1836) 3 Bing. N. C. 266, 278.
(9) (1881) 7 App. Cas. 49, 69.
(10) (1883) 8 App. Cas. 393.
(11) (1859) 2 E. & E. 160.
(12) (1867) L. R. 2 Ex. 139, 152.

H. L. (E.) 1917 MOORE v. EVANS.

tive total loss in a contract of marine insurance does not show any inherent difference between marine and other insurance, but is a rule of practice founded upon convenience: *Kaltenbach* v. *Mackenzie* (1); and see Marshall on Marine Insurance, c. 13. No distinction can be drawn between the goods in Germany and the goods in Belgium, for the occupation of Belgium by the Germans is of such a character as to constitute Belgium enemy territory: *Mitsui* v. *Mumford*. (2) The bailment of the goods is not an objection to the appellants' claim to recover, for the bailee cannot answer to the bailor. Where the bailee has the hand of force put upon him, and in obedience to the German Government keeps the goods in Germany instead of returning them to the bailor, then, whether the relation of bailor and bailee be deemed to be dissolved or suspended, inasmuch as it cannot be enforced, it does not affect the question whether the assured has lost his goods or not. If in a commercial sense the assured cannot get the goods they are lost. Alternatively, the appellants are entitled to claim as for a partial loss. There was here at least damage or misfortune to the goods, and the appellants are entitled to damages for being deprived of the opportunity of making a bargain out of their property and for having their capital locked up.

Sir John Simon, K.C., *Adair Roche, K.C.*, and *Patrick Hastings*, for the respondent were not called upon.

The House took time for consideration.

Nov. 1. LORD ATKINSON. My Lords, this is an appeal from an order of the Court of Appeal dated December 15, 1916, whereby the judgment of Rowlatt J. in favour of the appellants dated December 17, 1915, was set aside and judgment entered for the defendant with the costs of the action and of the appeal.

The action out of which the appeal arises, tried before Rowlatt J., was brought by the appellants on a Lloyd's policy dated January 14, 1914, against the respondent, one of the underwriters, as well on his own behalf as on that of all the other underwriters, to recover, in the language of the writ, "the loss, damage, or misfortune sustained by them" and covered by the policy. There is substantially no

(1) (1878) 3 C. P. D. 467, 471. (2) [1915] 2 K. B. 27.

dispute about the facts. The appellants are dealers in jewellery and precious stones, carrying on their business at 11, Hatton Garden, in the city of London. On different dates between June 16, 1914, and July 22, 1914, they, in the ordinary course of their business, sent jewellery belonging to them to four customers in Germany and Brussels on sale or return.

These customers were Messrs. Sturbelle & Co., Brussels, Messrs. Haardt & Devos, Brussels, Mr. L. Hackenbroch, Frankfort, and through the agency of Messrs. Neresheimer & Co., Holborn Viaduct, in the city of London, Mr. Robert Koch, of Frankfort. The documents sent by the appellants to their several customers relating to the dispatch of this jewellery contained on the face of them in each case a note to the following effect: "On sale for cash only or return. Goods had on sale or return remain the property of Moore and Gallop until invoiced by them. These goods must not leave your hands without our permission." In the absence of any special arrangements, goods thus sent on approval remain, according to the ordinary course of business in the trade, with the consignee for two or three weeks to give him the chance of selling them. The jewels, which were in the aggregate valued at 8747*l.*, arrived at their respective destinations, the receipt of them being acknowledged by the respective consignees. They were not invoiced by the appellants to any of these consignees or to any other person. The condition as to the necessity of an invoice was not waived in any case. The jewellery therefore remained the property of the appellants. Save in the two cases hereinafter mentioned, permission was never given by the appellants that the goods received should "leave the hands of any of the consignees." Nor was any special arrangement made with them that they should not be retained by the consignees in their hands longer than is customary in the trade.

On July 31, 1914, the appellants wrote to Mr. L. Hackenbroch, Frankfort, asking him to inform them if, in view of the then political situation, he had made any provision for the safe custody of the necklace (the jewel sent to him) in case of need, and requesting him, if he thought it perfectly safe to send by registered post, to return the necklace if he had already finished with it. No reply to this letter had, up to the hearing in the Court of Appeal, been received. On August 4, 1914, the day upon which war was declared between

H. L. (E.) 1917 MOORE v. EVANS. Lord Atkinson.

England and Germany, the appellants sent to Messrs. Sturbelle & Co. a telegram in the words following: "Telegraph what done with our goods." In reply to which these gentlemen sent to the appellants on August 5 a telegram in the following words: "Impossible send goods. Postal communication no longer assured since several days. Have placed in safety in bank. If you accept responsibility for returning will send you." On the same day the appellants sent, in reply to this latter telegram, a telegram in the words following: "Leave goods in safety in bank."

It is not disputed that the German forces soon after this date took, and still retain, possession of, Brussels, and have since they took it assumed the government and control of it, or that owing to the existence of the state of war between Germany and England neither the consignees of the goods, nor the bank with which the necklace has been deposited, could while the war lasts, without the consent of the Crowns of both countries, lawfully return to the appellants the jewellery they have respectively received. There is no evidence that such consent has been obtained or applied for. The evidence given does not suggest that any of the consignees other than Messrs. Sturbelle & Co. or the bank have lost or alienated or placed in the hands of others any portion of the jewellery they have respectively received, nor that the said jewellery or any portion of it has been destroyed or in any way injured, nor that the German Government have confiscated or taken possession of or assumed any control over any portion of it. Neither does it suggest that the bank and the consignees above mentioned have not from the first retained, and do not still retain, possession of the goods in their hands somewhat in the character of bailees for the appellants, and would not be ready and willing to return them to the appellants were it in their power lawfully to do so. It is not disputed that if peace came the appellants would be able by law to secure a return of their goods, or to recover damages for being deprived of them. By the policy of insurance the underwriters bind themselves to make good to the assured "all such losses, damage or misfortune not exceeding 45,000*l.* in all, as he or they may from time to time sustain by or from any of the causes" thereinbefore mentioned during the period from January 8, 1914, to January 7, 1915, within thirty days after the loss, damage, or misfortune is proved. The jewellery

is then insured while it is (save as in the policy provided) in or upon any premises or place whatsoever, or being carried or in transit by land or water in the United Kingdom or any country in Europe, and also whilst it is being carried or in transit by sea from any port or place in the United Kingdom or Europe to any other port or place in the United Kingdom or Europe, provided always that the policy should not apply to the property while in Spain or Russia.

The perils to the property insured against are "the loss of and/or damage or misfortune to the beforementioned property or any part thereof arising from any cause whatsoever," whether arising on land or water, save and except loss by theft or dishonesty committed under circumstances named by certain agents of the assured, and also except loss by theft or dishonesty committed by any broker or customer in respect of goods entrusted to them by the assured or their servants or agents, unless such loss arises when goods are deposited for safe custody by the assured, their servants or agents, with such broker or customer. Theft or dishonesty on the part of any of the appellants' customers cannot, of course, be presumed, but if it did take place the appellants would not in the cases specified have any right to recover. In the enumeration of the perils insured against the words "damage to the property" must mean, I think, "physical injury" to the property, but it is difficult to attach any rational meaning to the words "misfortune to the property" other than "loss or physical injury." The detention of the appellants' goods abroad may be a misfortune to the appellants themselves; but it is difficult to see how it can be a misfortune to their goods; and, indeed, the main contention of the appellants has been that this detention, considering the commercial purposes for which the appellants had acquired and held these goods, amounted to a total loss of them within the meaning of the policy. They did not rely much upon the words "misfortune, &c." It is not pretended in this case that the policy is a marine policy on goods; it was not argued, it could not be argued rationally, that, this being a non-marine policy, the appellants could recover for the loss or defeat of the adventure on which the goods were embarked. But the whole argument addressed to your Lordships on behalf of the appellants resolved itself into a sustained and elaborate endeavour to apply to the non-return of these goods the principles of the law of maritime

H. L. (E.) 1917 MOORE v. EVANS. Lord Atkinson.

insurance applicable to ships. The method pursued was this. Some passage from a judgment of a distinguished judge dealing with the loss of a ship, or of the goods carried by her and covered by a marine policy, was severed from the subjecta materia and applied to the present case. A good illustration of this is afforded by the use made of a passage culled from the judgment of Lord Abinger in the case of *Roux* v. *Salvador*. (1) That very learned lawyer was dealing with a case where the goods were, by one of the perils of the sea insured against, reduced to such a putrescent condition that they could not be carried to their journey's end. He said: "But if the goods once damaged by perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if by any circumstance over which he has no control they can never, or within no assignable period, be brought to their original destination; in any of these cases, the circumstance of their existing in specie at that forced termination of the risk, is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle." And then this last paragraph is applied to the present case, and it is argued that here from the first no person could assign a period to the duration of the war; that, during the twelve months covered by the policy, within which the loss must occur to give a cause of action on the policy, the goods were in the hands of strangers over whom the assured had no control; that the appellants, owing to an insuperable obstacle, the state of war, cannot recover their goods; therefore they are totally lost. To which is added the argument that the appellants are traders; the jewels were part of their stock-in-trade acquired by them for the purpose of sale or barter; that they have been for all this time disabled from disposing of them; that the goods are therefore lost to them, since they cannot dispose of them in their trade, though

(1) 3 Bing. N. C. 266, 279.

they might not be so to an owner who merely acquired them for ornament. This, I think, is rather to confound loss of the goods with the loss of the market for them. If the goods were returned to the appellants to-morrow they would have lost the use of them in their trade since January, 1914. Then cases such as *Shepherd* v. *Henderson* (1) were cited, which was a case of constructive total loss, notice of abandonment having been duly served. In the present case no notice of abandonment has ever been served, so constructive total loss is out of the question. It must be actual total loss or nothing.

It does not appear to me that there is any true analogy whatever between this case and the case of the loss of a ship or the goods it carries under a marine policy. I do not think the principles of the law of marine insurance apply, or that the numerous authorities which have been cited, other than two with which I shall presently deal, afford any help to the construction of this non-marine policy, or to the ascertainment of the true meaning of the word "loss" used in it—for this reason. Marine insurance grew out of the necessities of maritime trade and commerce. It dealt with the hazardous enterprise of the navigation of the sea by ships carrying cargo for reward. The law dealing with it is a branch of the law maritime as well as of the law merchant. It is founded upon the practices of merchants who were themselves for long the expounders of its principles, which principles general convenience had established in order to regulate the dealings of merchants with each other in all countries. Its utility, according to Marshall on Marine Insurance, 3rd ed., vol. i., pp. 3 et seq., cannot be better expressed than in the words of the preamble of a very early statute, 43 Eliz. c. 12, which recites that by means of policies of insurance "it cometh to pass upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few, and rather upon them that adventure not than those that do adventure, whereby all merchants, especially of the younger sort, are allured to venture more willingly and more freely." One can readily understand that those willing to adventure, who had possessed themselves of expensive but money-making chattels like ships for the purpose of their adventures, should, if they insured, be protected as far as possible from having their capital locked up unprofitably in

(1) 7 App. Cas. 49.

H. L. (E.) 1917 MOORE v. EVANS. Lord Atkinson.

ships whose fate they were unable actually to ascertain and prove. Hence it was that ships which had sailed and had not been heard of for a length of time were presumed not merely to have been lost, but to have foundered at sea, so that the owner would be at once entitled to recover the full amount under his policy.

So, also, as soon as these marine policies came to be regarded as indemnities and not wagering policies, the law of constructive total loss based upon notice of abandonment was shaped and moulded by decisions of Lord Mansfield about the middle of the eighteenth century. The doctrine had its origin in cases of the capture. *Goss* v. *Withers* (1) and *Hamilton* v. *Mendes* (2), were both cases of capture and recapture, and were apparently based upon the principle that the assured should not be obliged to wait till he had definitely ascertained whether his ship had been recaptured or not, but might upon capture proceed at once and, after notice of abandonment, recover his capital, the value of his ship, from the underwriters, provided he was not aware of her recapture when he commenced his action.

I am quite unable to follow the line of reasoning by which the principles of a body of laws having such an origin and directed to such an end can be made applicable to the insurance of a jeweller's stock-in-trade, or that the language used to describe what amounts to the loss of a ship or her cargo under a marine policy is necessarily adequate to describe a loss of this stock-in-trade under a non-marine policy. The only authorities cited which to any extent support the appellants' contention are, first, *Mitsui* v. *Mumford* (3), and, secondly, *Campbell & Phillips, Ld.* v. *Denman*. (4) In the first, which was tried before Bailhache J. without a jury, a policy was effected by the plaintiffs on timber belonging to them, then warehoused in Antwerp waiting for sale, and watched by two foremen in the employment of the plaintiffs' agent in Antwerp. The policy was dated August 5, 1914, and was a three months' policy from August to November, 1914. The risks insured against were "loss directly caused by war, military or usurped power . . . . No claim to attach hereto for delay, deterioration and/or loss of market, or for confiscation by the Government of the country in which the

(1) 2 Burr. 683.
(2) 1 W. Bl. 276.
(3) [1915] 2 K. B. 27.
(4) 21 Com. Cas. 357.

property is situated." The plaintiffs gave notice of abandonment on October 14, 1914, and in their points of claim alleged they had suffered a total or constructive loss of the timber.

The German Government had not seized, confiscated, or interfered with the timber in any way. It remained stored in Mr. Meerbergen's warehouse, watched by his men as it had been from the first, and was safe at the end of November, 1914. The learned judge, after stating that he could not judicially assume that the German Government would commit a breach of international law and confiscate the timber or take it for the necessities of war without paying for it, said (1): "even if I make these assumptions which the plaintiffs desire, the timber is at present in the hands of the plaintiffs' agent, no loss by confiscation has happened, there has been no seizure by the Germans, and the policy has expired. Without seizure the plaintiffs cannot lay any foundation upon which to support this claim, and it fails. In my judgment there has not been a loss of this timber to the plaintiffs either actual or commercial." The ratio decidendi was the continued possession of the timber by the agent of the plaintiffs coupled with the absence of seizure by the Germans; but undoubtedly the learned judge in the earlier portion of his judgment does lay down dicta which tend to support the arguments of the appellants' counsel. Yet, though, having regard to the ground of the decision, they are merely obiter dicta, they are entitled to great weight coming from a learned judge so familiar with maritime and commercial law.

After pointing out that on the authority of Brett L.J. in *Kaltenbach* v. *Mackenzie* (2) the expression "constructive total loss" is never used except in reference to marine insurance, and that a notice of abandonment is confined to and is an integral part of constructive total loss, he then proceeds: "It does not to my mind follow from this that actual permanent deprivation of the timber is essential in this case. This is a business policy, and if the facts showed a loss of the timber in a commercial sense I should hold the plaintiffs entitled to succeed. If, for instance, the plaintiffs were unable, owing to a peril insured against, to deal with this timber and were liable to be prevented for so long a time that the cost of warehousing would in all probability exceed the value of the timber before

(1) [1915] 2 K. B. 31, 34. (2) 3 C. P. D. 467, 471.

H. L. (E.) 1917 — MOORE v. EVANS. — Lord Atkinson —

the plaintiffs could dispose of it, I should be prepared to hold that there was a loss of the timber within the meaning of the policy." It is not necessary in this case to pronounce agreement or disagreement with this expression of opinion, but I confess to me it looks very like an application of the constructive total loss principle, He then proceeds : " Since writing this judgment I have read over again some observations of Blackburn J. in advising the House of Lords in *Rankin* v. *Potter*. (1) I had forgotten them and had arrived at the conclusion indicated by me unaided by authority, but I am strengthened in my view by what Blackburn J. there says. The result is that although I think it is wrong to use the expression 'constructive total loss' in connection with this policy, and unnecessary to allege notice of abandonment, yet it is right in considering whether there has been a loss under this policy to take into account considerations similar to those which one would take into account in determining a question of constructive total loss under a marine policy." If that means that principles of the law as to constructive total loss are to be applied in effect, though not in name, but under an alias as it were, to a loss under a non-marine policy, I respectfully dissent from the learned judge's opinion. Blackburn J., as he then was, did not, I think, lay down anything in the passage of his judgment referred to which supports such a conclusion. He was dealing with the equitable doctrine, not peculiar to marine insurance, that he who recovers on a contract of indemnity must and does by taking satisfaction from the person indemnifying him cede all his rights in respect of that for which he obtains indemnity to that person —such, for instance, as the transfer of the salvage under a fire insurance. At p. 119 he deals with the point that where the party indemnified has a right to an indemnity and has elected to enforce his claim he is bound by his election.

In the second case, tried before Bray J. without a jury, the goods insured were stored in a warehouse at Antwerp. They were insured for three months from July 27, 1914, against loss or damage directly caused by war. Antwerp was occupied by the German forces on October 9, 1914. During the currency of the policy on October 18, a Proclamation was published by the German Government to the effect that till the requirements of the army were ascertained the

(1) (1873) L. R. 6 H. L. 83, 119.

sale or purchase of goods of the class insured was prohibited. On October 21, 1914, there was a further Proclamation published prohibiting the shifting, working, or handling these goods in any way without permission. On October 25 the owner of the warehouse sent in a list of the goods to the German Government. In December, 1914, the German Government requisitioned the goods. Notice of abandonment had been given on October 15, 1914.

The learned judge held, following *Mitsui* v. *Mumford* (1), that as the plaintiffs' agent, the owner of the warehouse, had not been deprived of the possession of the goods, though it was uncertain whether the owner would recover the goods, yet he could not say it was unlikely that he would recover them and decided against him. The strange thing is that the learned judge seems to have treated the Marine Insurance Act of 1906 as applicable to the case, and used the definitions given in it of actual and constructive total loss to help him to decide whether there was a loss under the policy or not, although that statute is expressly confined to marine insurance. In my opinion that statute had no application whatever to the policy in that case. The actual decisions, however, in both these cases make against the appellants' case rather than support it. The bank is in a position closely resembling that of the warehousekeepers, if, as I think, the evidence suggests that Messrs. Sturbelle & Co. placed the goods with the bank to be safely kept for the appellants and so informed the bank. The bank then became the gratuitous bailees of the appellants. The consignees, other than Sturbelle & Co., are also, on the evidence, in the position of bailees for the appellants. The time during which they might have exercised their option to purchase expired during the twelve months covered by the policy. They hold the appellants' goods under an obligation to return them. The laws of the two countries forbid the discharge of this obligation save with the consent of both Sovereigns; but that disability to discharge this obligation does not relieve them of the other obligation to keep the goods safely for the plaintiffs till the termination of the war, or till by the consent of both Sovereigns they are permitted to return them earlier. On the evidence as it stands I think the appellants have failed on every point. The decision of the Court of Appeal was in my opinion absolutely right-

(1) [1915] 2 K. B. 27.

H. L. (E.) 1917 MOORE v. EVANS.

and the appeal should be dismissed with costs ; but I think that the appellants should even now be given the option of having an order made under Order XXVI., r. 1, that the action be discontinued.

LORD PARKER OF WADDINGTON. My Lords, I agree.

It appears to me impossible to say that the goods in question were during the currency of the policy " lost " within the ordinary meaning of that word, and there is no evidence whatever of any damage or misfortune having occurred to the goods themselves. So far as the evidence goes the goods remain safe and undamaged in the custody of persons who are in the position of bailees for the appellants, but who cannot at present return them because of the war. It is only by introducing, in the construction of a non-marine policy, considerations which by the custom of merchants are no doubt material in construing a marine policy that the case for the appellants becomes in any way arguable. For the reasons given by my noble and learned friend Lord Atkinson and by Bankes L.J. in the Court of Appeal I do not think that such introduction is admissible. In my opinion, therefore, the appeal fails.

LORD PARMOOR. My Lords, I concur.

LORD WRENBURY. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs. Ordered that the judgment entered for the defendant in the action referred to in the said order shall not prejudice any future action by the appellants or be pleaded in bar thereto.

Lords' Journals, November 1, 1918.

Solicitors for appellants : *William Hurd & Son.*
Solicitors for respondent : *Windybank, Samuell & Lawrence.*

[HOUSE OF LORDS.]

CORNELIUS . . . . . Appellant;

AND

PHILLIPS . . . . . Respondent.

H. L. (E.)*
1917
Nov. 29.

Money-lender—Business carried on elsewhere than at registered Address—Isolated Transaction—Avoidance of Transaction—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*b*).

The appellant was asked by a friend to assist him in raising money, and was introduced by him to the respondent, who was a registered money-lender, though this fact was not known to the appellant. The appellant signed a promissory note for 300*l.*, which was produced by the respondent, and received from the respondent a cheque for a smaller amount, which he indorsed and handed to his friend. This transaction was carried out at an hotel at some distance from the respondent's registered address :—

Held, (1.), that the transaction amounted to a carrying on of his business by the money-lender at an address other than his registered address in contravention of s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900; and (2.) that the effect of the Act was to avoid the transaction.

Kirkwood v. *Gadd* [1910] A. C. 422 and *Whiteman* v. *Sadler* [1910] A. C. 514 explained and distinguished.

Dicta of Lord Dunedin and Lord Mersey in the latter case disapproved.

Decision of the Court of Appeal [1916] 2 K. B. 719 reversed.

Appeal from a decision of the Court of Appeal (1), reversing a decision of Ridley J.

The respondent was a registered money-lender, and his registered address was 33, Crown Street, Liverpool.

The appellant was the maker of a promissory note dated November 24, 1914, for 300*l.* payable to the respondent six months after date.

The respondent indorsed the promissory note for value to Karl Finegold, who became holder thereof for value without notice of any defect therein.

* *Present :* Lord Finlay L.C., Viscount Haldane, Lord Dunedin, Lord Atkinson, and Lord Parmoor.

(1) [1916] 2 K. B. 719.

H. L. (E.) 1917 — CORNELIUS v. PHILLIPS.

In June, 1915, Finegold commenced an action against the appellant on the promissory note for payment of principal and interest. Thereupon the appellant issued a third party notice to the respondent claiming to be indemnified by him under the Money-lenders Act, 1911, against liability on the promissory note, on the ground that the note was given in respect of a money-lending transaction which was not carried out at the respondent's registered address, and that the note was void against the appellant under the Money-lenders Act, 1900. Finegold obtained leave to sign judgment against the appellant for 310*l.* 0*s.* 9*d.*, which was duly paid to him by the appellant.

Upon the third party issue Ridley J. gave judgment for the appellant for 310*l.* 0*s.* 9*d.* and costs.

The Court of Appeal by a majority (Swinfen Eady L.J. and Bankes L.J., Phillimore L.J. dissenting) held on the authority of *Whiteman* v. *Sadler* (1) that, though the money-lender, in entering into this transaction, was carrying on his money-lending business elsewhere than at his registered address in contravention of s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, the transaction was not thereby rendered void, and that therefore the present appellant was not entitled to an indemnity.

The facts are fully stated in the judgment of the Lord Chancellor.

1917. Oct. 30 ; Nov. 1. *Greer, K.C.* (with him *Clement Davies*), for the appellant. Two questions are raised by this appeal : (1.) Whether s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, which forbids a money-lender to carry on the money-lending business otherwise than in his registered name and at his registered address, applies to a single money-lending transaction ; and (2.) Whether, assuming that a single transaction is within the statutory prohibition, the effect is to make this contract void. The Court of Appeal decided that the appellant was right on the first point, but (Phillimore L.J. dissenting) wrong on the second, and that the effect of the prohibition was merely to subject the money-lender to the penalties imposed by sub-s. 2, and not to avoid the transaction. As to the first point, one complete transaction is as much within the Act as fifty complete transactions. *Kirkwood* v. *Gadd* (2) is distinguish-

(1) [1910] A. C. 514. (2) [1910] A. C. 422.

able, because there the transaction in question was not completely carried out away from the registered address, and the decision was merely that the Act did not require that every stage of the transaction should be carried out at the registered address. [He was stopped on this point.] As to the second point, the majority of the Court of Appeal proceeded upon a misapprehension of *Whiteman* v. *Sadler* (1), by which they conceived themselves to be bound. That was a case of a money-lender having two registered names. This House held that that was wrong, but that, inasmuch as the Commissioners had allowed the registration, so long as that registration stood, it could not be said that a transaction in one of his registered names was void. Here the ground of illegality is that the transaction is completely carried out elsewhere than at the registered address, and it is settled law that a contract which is expressly or impliedly forbidden by the Legislature can give no cause of action to a party who seeks to enforce it.

Leslie Scott, K.C., and *Rigby Swift, K.C.* (with them *W. Greaves Lord*), for the respondent. 1. One transaction does not constitute the offence of carrying on business: *Kirkwood* v. *Gadd.* (2) As Lord James of Hereford there points out, if clause (*b*) extended to isolated transactions, clause (*c*) would be unnecessary. 2. Sect. 2, sub-s. 1 (*b*), contains nothing which avoids the contract as distinguished from exposing the offender to a penalty. Clause (*b*) deals with the two types of transaction which constitute the fraudulent operation of a money-lender's business; it is not dealing with incidental matters. Clause (*c*) throws into distinction the carrying on of the business and the entering into a contract in the course of that business. Under clause (*b*) contracts made in the course of the business are not avoided; under clause (*c*) certain contracts are prohibited: *Whiteman* v. *Sadler.* (3) In that case both Lord Dunedin and Lord Mersey take the view that contracts made in the course of a business carried on in contravention of clause (*b*) are not thereby avoided, and that the only clause which invalidates contracts is clause (*c*).

Greer, K.C., replied.

(1) [1910] A. C. 514. (2) [1910] A. C. 422.
(3) [1910] A. C. 514, 527, 534.

H. L. (E.) 1917 — CORNELIUS v. PHILLIPS.

The House took time for consideration.

Nov. 29. LORD FINLAY L.C. My Lords, the question in this case is whether a single transaction of lending may amount to carrying on a money-lending business at an address other than the registered address of the money-lender, and, if so, whether the Money-lenders Act, 1900, renders it void.

The respondent was a money-lender registered under the Act, his registered address being at 33, Crown Street, Liverpool. The appellant is a young man holding a commission in the Royal Garrison Artillery, and had been asked by a friend of his of the name of Shelmerdine, to assist him in raising money. The appellant and Shelmerdine went out for a walk together, and Shelmerdine took the appellant to the Blundell Arms Hotel, Formby, where they found the respondent, who was quite unknown to the appellant. The respondent produced two promissory notes, each for 300*l.*, one in favour of the respondent and the other in favour of the appellant, which were then and there signed, the former by the appellant and the latter by Shelmerdine. The respondent then drew a cheque for 200*l.* to the appellant's order, and this was indorsed by the appellant and handed over to Shelmerdine, who received payment.

The effect of this transaction was that Shelmerdine got 200*l.*, while the appellant became indebted on his promissory note to the respondent for 300*l.*, in respect of which liability the appellant held Shelmerdine's promissory note for the same amount.

The respondent transferred the appellant's promissory note to one Finegold, and he in the capacity of bona fide holder for value without notice sued the appellant. Finegold was entitled to recover by virtue of the Money-lenders Act, 1911 (1 & 2 Geo. 5, c. 38), s. 1, but as that Act gave Cornelius a right of recourse against Phillips the latter was made party to the action under a notice claiming indemnity. Finegold signed judgment against Cornelius for 300*l.* with interest and costs, and Cornelius filed a statement of claim against Phillips claiming indemnity.

The case was tried before Ridley J., who gave judgment in favour of Cornelius as against Phillips. This judgment was reversed in the Court of Appeal by Swinfen Eady and Bankes L.JJ., Phillimore L.J. dissenting. All the members of the Court of Appeal agreed in

finding that the transaction amounted to a carrying on of the business, but the majority took the view that the transaction was not rendered void by the Act, while Phillimore L.J. held that it was. The present appeal is brought from the decision of the Court of Appeal.

The case turns upon the construction of the 2nd section of the Money-lenders Act, 1900, which, so far as is material, is as follows :—

"2.—(1.) A money-lender as defined by this Act—

"(*a*) shall register himself as a money-lender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender ; and

"(*b*) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address ; and

"(*c*) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as money-lender, otherwise than in his registered name ; and

"(*d*) shall on reasonable request, and on tender of a reasonable sum for expenses, furnish the borrower with a copy of any document relating to the loan or any security therefor.

"(2.) If a money-lender fails to register himself as required by this Act, or carries on business otherwise than in his registered name, or in more than one name, or elsewhere than at his registered address, or fails to comply with any other requirement of this section, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding one hundred pounds, and in the case of a second or subsequent conviction to imprisonment . . . .

"(3.) A prosecution under sub-section (1) (*a*) of this section shall not be instituted except with the consent in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland."

H. L. (E.) 1917 CORNELIUS v. PHILLIPS. Lord Finlay L.C.

I agree with all the judges in the Court below in thinking that the transaction contravened the provisions of head (*b*) of this section, sub-s. 1. The whole of the transaction in this case, in every one of its stages as between the money-lender Phillips and the borrower Cornelius, was carried out at the Blundell Arms Hotel, which was not the registered address of Phillips. In effecting this transaction Phillips was carrying on the money-lending business. If the transaction had been substantially effected at the registered address of the money-lender, the fact that some subsidiary acts had been done elsewhere would not have amounted to a contravention of head (*b*), but here no part of the transaction was carried out at the money-lender's address. I entirely agree with what is said on this point in the judgment of Swinfen Eady L.J. The matter seems to me clear on principle, and there is a great weight of authority in favour of the view which was taken on this point in the Courts below.

It was argued before this House that, if a single transaction might amount to a carrying on of business under head (*b*), head (*c*) would be surplusage, and that therefore head (*b*) must be read as dealing only with a course of business or a series of transactions as distinguished from one transaction. I cannot agree. Having regard to the manner in which Acts of Parliament are drawn, the argument that a restricted meaning must be adopted for a certain provision in a statute on the ground that otherwise there would be repetition in a subsequent provision is not a very safe guide. The repetition may have been ex majore cautela only. But, further, (*c*) is not surplusage. It is not correct to say that all the transactions which would fall within head (*c*) would have been covered by head (*b*), inasmuch as taking particular agreements or securities might be merely incidental to the transaction, and would not fall within (*b*), but it may have been considered advisable to secure complete publicity for the registered name of the money-lender by providing specifically by head (*c*) that in every one of these documents the registered name should appear. All that was decided by the House of Lords in *Kirkwood* v. *Gadd* (1) was that every stage and every incident of the money-lending business need not be transacted at the registered office.

The question remains whether this contravention of the statute

(1) [1910] A. C. 422.

rendered the transaction void, or merely subjected the money-lender to a penalty.

While Phillimore L.J. held that the transaction was void, the majority of the Court of Appeal held that it merely subjected the money-lender to a penalty, proceeding solely on the ground that they thought the point was concluded by the decision of this House in *Whiteman* v. *Sadler*. (1) In my opinion the point should have been decided by the Court of Appeal on its own view of the construction of the section, as it was not covered by the decision in *Whiteman* v. *Sadler*. (1)

It is admitted on all hands, and indeed could not be disputed, that a statutory prohibition avoids any transaction in contravention of the prohibition, as the transaction is unlawful, and any contract which forms part of it is void and can confer no rights. The Act of 1900 by s. 2, sub-s. 1, provides that a money-lender shall carry on a money-lending business at his registered address and at no other address, while sub-s. 2 imposes a penalty for contravention of this provision. The words of the statute prohibit carrying on the money-lending business at any address other than the registered address, and to do so is therefore an unlawful act. Heads (*b*) and (*c*) stand in this respect on precisely the same footing; there is a prohibition in (*b*) just as much as in (*c*).

The case with which the House of Lords had to deal in *Whiteman* v. *Sadler* (1) was that of a money-lender who had been in fact registered, but it was said that the registration was void and ought to be disregarded for two reasons: first, that the registration was in a trade name, and inasmuch as he had never before carried on business in that name he could not be registered under it as his "usual trade name" (s. 2, sub-s. 1 (*a*)), and ought to have been registered in his own name; and second, that the money-lender under different names carried on one business as an individual and another as a member of a firm, and that the registration was therefore in contravention of s. 2, sub-s. 1 (*b*). It was therefore contended that the registration should not have been effected, and being wrongful was void.

In order to understand the judgments in the House of Lords the earlier history of the case must be examined. Arthur and Walter

(1) [1910] A. C. 514.

H. L. (E.) 1917 CORNELIUS v. PHILLIPS. Lord Finlay L.C.

Whiteman carried on business as money-lenders, and were registered under the name of Cobb & Co., at Moorgate Street, while Arthur also carried on business as a money-lender under another name at Seven Sisters Road. The plaintiff in the action applied for a loan at the office of Cobb & Co. The loan was arranged and a bill of sale was given as security, under which the money-lender seized the goods. Sadler thereupon brought an action of trespass, and contended that the bill of sale was invalid. The case was tried before Bray J. His judgment is printed in the appendix to the Case in the House of Lords, and the course of the proceedings before him is set out in the judgments of Vaughan Williams L.J. and Farwell L.J. in the Court of Appeal. (1) The first ground of invalidity alleged was that Cobb & Co. was not the usual trade name of the brothers Whiteman, as they were not known by that name as money-lenders before registration. Bray J. held that the words "usual trade name" were satisfied, as Cobb & Co. was the trade name under which they intended to carry on business, and that this complied with the Act. The other main objection to the validity of the bill of sale was that Arthur Whiteman, one member of the firm of Cobb & Co., was also registered and carried on business as a money-lender under another name at another address. Bray J. held that this was not an infringement of the Act, on the ground that the one business was that of the firm and the other that of one of the members alone. He accordingly dismissed the action with costs, holding both objections invalid. The Court of Appeal by a majority, consisting of Fletcher Moulton L.J. and Farwell L.J., reversed Bray J.'s judgment on these points and entered judgment for the plaintiff, treating the bill of sale as void.

The case was brought on appeal to this House. Lord Macnaghten, with whom Lord Loreburn L.C. concurred, agreed with the Court of Appeal, and held that the Act was infringed because Cobb & Co. was not the usual trade name and also because Arthur Whiteman was carrying on two businesses under different names, but he differed as to the effect of this contravention of the Act, holding that as there was a de facto registration the registration could not be treated as void so as to avoid the bill of sale under s. 2, sub-s. 1 (*c*). In other words, he held that registration de facto cannot be ignored

(1) [1910] 1 K. B. 868.

for the purposes of s. 2, sub-s. 1. Lord Macnaghten says (1): "A money-lender registered under these regulations is to carry on the money-lending business in his registered name and in no other name. That is s. 2, sub-s. 1 (*b*). He is not to enter into any agreement in the course of his business otherwise than in his registered name. That is s. 2, sub-s. 1 (*c*). . . . . If, in violation of the plain words of the Act, a money-lender trades without being registered at all, or being registered trades in another name, he is very properly left to the mercy of any one who chooses to attack him, and his contracts are rightly avoided. But if he is registered by the Commissioners and registered improperly, the fault does not lie with him alone."

A little further down Lord Macnaghten goes on to say: "In the case of an alleged infringement of sub-s. 1 (*a*), the subsection with which the Commissioners are mainly concerned, no prosecution can be instituted except with the consent of the law officers. No such provision is made with regard to (*b*) or (*c*). This seems to me to shew that what the Act meant to strike at in (*c*) was the case of a person actually registered by the Commissioners contracting otherwise than in his registered name, and that, so long as his name remains on the register, his contracts in that name are not to be held void, or his action in making contracts in that name punishable by fine and imprisonment."

It was under (*c*) that the bill of sale given by Sadler was impeached. No question arose with regard to the effect of (*b*) except as avoiding the registration. The whole transaction was carried out in the registered name of Cobb & Co., and as Bray J. held (as stated by Farwell L.J. (2)), substantially at the money-lender's address. The bill of sale was not void on the ground that Arthur Whiteman carried on business under another name except on the view that the registration was on this ground improper, and therefore should have been treated as non-existent, so as to make the case one of a money-lender with no registered name.

Lord Dunedin points out at p. 525 that registration of Cobb & Co. ought to have been refused on the ground that Cobb & Co. was not their usual trade name, and that Arthur Whiteman, being already registered, could not be again registered. On p. 527 he says: "I

(1) 1910] A. C. 521, 522, 525, 527. (2) [1910] 1 K. B. 868, 890.

H. L. (E.) 1917

CORNELIUS v. PHILLIPS.

Lord Finlay L.C.

come therefore to the conclusion that the contract here was only void if it was struck at by the prohibition in s. 2 (1.) (*c*). Was it so struck at? It is said that because we hold the registration to have been an improper registration therefore it was no registration. I do not think so. I think registered name means de facto registered name, and that it would be contrary to all justice to penalize the appellants for what was really a mistake of the Inland Revenue. The appellants had a registered name, and I think the statute sought only to prohibit dealings in a name which was not registered at all."

This last passage really contains a statement of all that was decided in *Whiteman* v. *Sadler* (1), and Lord Loreburn L.C. expressed his concurrence with Lord Dunedin's judgment as well as with Lord Macnaghten's.

In the result the House of Lords restored the judgment of Bray J., but for very different reasons.

I have read with great attention the passage in Swinfen Eady L.J.'s judgment in which he deals with the effect of the decision of the House of Lords in *Whiteman* v. *Sadler*. (1) It appears to me to overlook the fact that in that case the whole question was whether the registration was vitiated and should be treated as non-existent.

At p. 521 of the report of *Sadler's Case* (1) in the House of Lords occur the words which I have already quoted: "If, in violation of the plain words of the Act, a money-lender trades without being registered at all, or being registered trades in another name, he is very properly left to the mercy of any one who chooses to attack him, and his contracts are rightly avoided."

Swinfen Eady L.J. understands that Lord Macnaghten in this passage was referring to contracts in violation of s. 2, sub-s. 1 (*c*). I cannot so understand Lord Macnaghten. It appears to me plain that he was referring not to s. 2, sub-s. 1 (*c*), but to s. 2, sub-s. 1 (*b*). No question was raised in *Whiteman* v. *Sadler* (1) as to the effect of an infringement of s. 2, sub-s. 1 (*b*), except by way of rendering the registration null. The decision was that the registration was not null, although it should not have been effected.

I cannot agree with the statement in Lord Mersey's judgment that "there is no express prohibition in either of those clauses' (*a*) and (*b*), "whereas in clause (*c*) there is." Heads (*b*) and (*c*)

(1) [1910] A. C. 514, 521.

appear to me, for the reasons I have stated earlier in this judgment, to stand exactly on the same footing.

Bankes L.J. in his judgment says (1): "It is not, therefore, for us on the present occasion to give any independent judgment, but only to ascertain how far, if at all, the decisions of this Court on these questions have been adopted or dissented from in the House of Lords." He goes on to say that the judgment of Lord Dunedin appears to him to decide in terms that the effect of a breach by a money-lender of the provisions of s. 2, sub-s. 1 (*b*), does not invalidate the transaction, and adds: "I have some difficulty in taking the same view of Lord Macnaghten's language, but as Lord Loreburn and Lord Ashbourne treat the opinions of Lord Macnaghten and Lord Dunedin as being in accord, I think the decision of *Whiteman* v. *Sadler* (2) in the House of Lords must be treated as a decision in the appellant's favour." I think that Lord Dunedin and Lord Macnaghten were in accord, but in a sense opposite to that which the Lord Justice ascribed to them.

The majority of the Court of Appeal in this case have expressed no opinion of their own upon the point in dispute. I think it was open to them to do so, and I concur in the conclusion reached by Phillimore L.J. For these reasons, I think that the appeal should be allowed and the judgment of Ridley J. restored. The appellant should have his costs here and in the Court of Appeal.

VISCOUNT HALDANE. (3) My Lords, I think that this appeal should succeed. The facts are not in dispute. According to the appellant's evidence, Shelmerdine, who was a friend of his, wanted him to back a bill in order that money might be advanced on it to him, Shelmerdine. He told the appellant that a friend who would lend the money was at the Blundell Arms Hotel, which is not in Liverpool, though not very far from it. The appellant and Shelmerdine found the respondent in a room at the hotel. The appellant did not know who the respondent was, or that he was a registered money-lender carrying on business at an address in Liverpool, and he was not told. He signed a promissory note for 300*l.*, which was produced by the respondent, and the latter handed him a cheque

(1) [1916] 2 K. B. 740. (2) [1910] A. C. 514.
(3) Read by Lord Dunedin.

H. L. (E.) 1917

CORNELIUS v. PHILLIPS.

Viscount Haldane.

for a smaller amount, which he indorsed. The respondent then handed the cheque to Shelmerdine. The respondent did not enter the box or challenge this evidence.

Two questions arise on these facts. The first is whether the respondent, who was a registered money-lender whose registered address was in Crown Street in Liverpool, carried out this particular transaction in his money-lending business " at his registered address or addresses " within the meaning of s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900. The second question is whether, if the first question be answered in the negative, the effect was to render the transaction void, or was merely to expose the money-lender to liability for criminal proceedings without rendering the transaction void.

On the first question the Court of Appeal decided in the appellant's favour, and I entertain no doubt that they were right in holding as they did that the sub-section applies, whether or not the place other than his registered address where the transaction has taken place is one at which the money-lender can be said to have an address of a different kind. On the facts it is clear that the transaction, as between the appellant and the respondent, the only parties who, under the circumstances of the case, have to be considered, took place and was carried out in its integrity at this hotel.

On the second question the Court of Appeal by a majority (Phillimore L.J. dissenting) decided that the point was covered by the decision of this House in *Whiteman* v. *Sadler*. (1) There a money-lender had been registered under the statute by the Commissioners of Inland Revenue, to whom the duty of registering him had been entrusted by the Legislature, under two names. It was held that this was an improper act of the Commissioners, but that, as the name under which the money-lender had traded was de facto registered, even though improperly, the statute did not render illegal a transaction entered into in a name thus registered. It was said in the course of the judgments that if the transaction had fallen within s. 2, sub-s. 1 (*c*), by reason of not being entered into in any registered name, it would have been avoided, but that the language used should not be construed as avoiding transactions which de facto complied with s. 2, sub-s. 1 (*a*). The only point before the House was whether a registered name meant a name which was de facto

(1) [1910] A. C. 514.

registered. There was no question as to whether, if the case was one to which sub-s. 1 (*b*) applied by reason of the transaction being carried out otherwise than at a registered address, it was rendered void. None of the judgments were directed to the consideration of such a point, and even if the dicta relied on by the majority in the Court of Appeal can be read as covering it in words, which I greatly doubt, they were not part of the decision, and I wish to add that dicta by judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless these dicta really form integral parts of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding. Now, I do not find in any of the judgments in this House, read in their entirety, an intention to decide the question on sub-s. 1 (*b*) which was before the Court of Appeal in the present case and is before us now, and, as I have said, I doubt whether any of the isolated dicta in question justify the assumption that there was even in these dicta an intention to consider the point. We are therefore free on the present occasion to construe the sub-section according to the words which the Legislature has used. These words do not appear to be ambiguous. They enact that a money-lender shall carry on his business at his registered address and at no other address. So standing they are clear, and they prohibit, and therefore make void, any contract which contravenes them. That there is a subsequent sub-section which makes a contravention by the money-lender a criminal offence makes no difference. There might have been inserted in the statute a special context which would have modified the application of the general rule, but there is nothing in the actual context to exclude the ordinary result which follows in law when a statutory prohibition is disregarded. I am therefore of opinion that the majority in the Court of Appeal were wrong in their answer to this question.

LORD DUNEDIN. My Lords, the first question in this case is in my view a pure question of fact, was the respondent on November 24, 1914, at the Blundell Arms, Formby, carrying on the business of a money-lender? I think he was. Each case depends on its own circumstances. *Kirkwood* v. *Gadd* (1) only decided that if a parti-

(1) [1910] A. C. 422.

H. L. (E.) 1917 CORNELIUS v. PHILLIPS. Lord Dunedin.

cular transaction is substantially arranged and started at the money-lender's registered place of business, the mere fact that certain incidental proceedings are carried through at another place does not make the money-lender carry on business at that other place. It was said that this was an isolated transaction. That fact is not conclusive one way or other, though it may in particular circumstances lead to an inference decisive of the question. Here I think the respondent only appeared at the Blundell Arms as a money-lender for the purposes of a money-lender, and in fact acted as, and so carried on the business of, a money-lender.

There remains the question of what is the result, and it was strongly urged that the decision of this House in *Whiteman* v. *Sadler* (1) settles that unless there is an infringement of s. 2, sub-s. 1 (*c*), the contract itself is not avoided.

My Lords, the opinion of Lord Mersey does go that length, and an expression used by myself, Expressio unius est exclusio alterius, would, although directed to s. 2, sub-s. 1 (*a*), apply in terms to s. 2, sub-s. 1 (*b*). But, though I was only speaking as to the application to s. 2, sub-s. 1 (*a*), I am satisfied on reconsideration that the expression I used was not accurate if applied to s. 2, sub-s. 1 (*b*), because s. 2, sub-s. 1 (*c*), and s. 2, sub-s. 1 (*b*), do not cover exactly the same ground. The judgment is binding on us, but, further, I have no doubt it was right. Two views may be taken. Inasmuch as Whiteman had been de facto registered, although wrongly registered, it might be held that there had been no contravention of any of the sections. That is not my own view. I think there had been a contravention of s. 2, sub-s. 1 (*a*), though I think that, in view of the faulty regulations issued by the Inland Revenue, the Attorney-General might well have withheld his consent to any prosecution, or even if he had given it, a jury might have refused to convict. But the contravention had nothing directly to do with the contract. In fact it came within the category of matters collateral, as pointed out by Tindal C.J., in *Fergusson* v. *Norman*. (2) This was the view expressed in the present case by Phillimore L.J., and I think it was the correct one.

My Lords, as I said in *Whiteman's Case* (3), the question always

(1) [1910] A. C. 514. (2) (1838) 5 Bing. N. C. 76.
(3) [1910] A. C. 526.

comes to be put, as Parke B. put it in *Cope* v. *Rowlands* (1), Does the statute seek to prohibit the contract? Sect. 2, sub-s. 1 (*b*), seems to me to prohibit the contract, though it is expressed in words which apply directly to the contractor rather than to the contract. Indeed, if one looks at the mischief sought to be remedied, the case seems to me a stronger one than that of *Cope* v. *Rowlands*. (1) I am therefore of opinion that the appeal should be allowed.

LORD ATKINSON. My Lords, I concur.

The facts have been already stated. It is not disputed that when the appellant met Phillips in the small room at the back of the hotel he did not know, and was not told who or what he was. He merely thought he was a friend of Shelmerdine. Phillips appears to have been then furnished with two of the instruments of his trade, two promissory notes already drawn up. The transaction had the true money-lender's ring about it. No rate of interest is mentioned in the promissory note which Cornelius signed, but, in fact, he was to pay 100*l.* for the loan of 200*l.* for six months—cent. per cent. Phillips' cheque was indorsed by both the appellant and Shelmerdine and given to the latter. Now, that this transaction was regarded by Phillips as a transaction carried out by him in the conduct of his business of money-lending, and not as an isolated transaction unconnected with that business, is evident from this, that he entered the transaction as of November 24 in the ledger account of his money-lending business. He also entered the transfer of the note on May 5, 1915, to K. Finegold, the alleged bona fide holder for value without notice of any defect due to the operation of the 2nd section of the Money-lenders Act of 1900 so as to secure for it the protection afforded by s. 1 of the Money-lenders Act of 1911. He had carried out that matter in his registered name. In that name he was made the payee of the promissory note. He had nothing, therefore, to fear from s. 2 of the Act of 1900, unless the carrying out of this transaction amounted, under sub-s. 1 (*b*) of that section, to carrying on his money-lending business at an address other than his registered address. If it did, a transfer might have been thought desirable to obviate the result of the illegality. No explanation was given by Phillips why it was made. He shrank from appearing in

(1) (1836) 2 M. & W. 149.

H. L. (E.) 1917 CORNELIUS v. PHILLIPS. Lord Atkinson.

the witness-box. It is of course quite evident that the whole transaction was arranged between Phillips and Shelmerdine before the latter called upon the appellant on the morning of November 24.

No difficulty arises about the meaning of the words "address" or "addresses" in s. 2, sub-s. 1 (*b*), of the Act of 1900. The immediately preceding provision shows, I think, that the word "address" is used to identify the houses or house, office or building in which the money-lender carries on his money-lending business. If he should carry it on in any house, office or building other than that registered as his address, then he would commit a crime within the provision of sub-s. 1 (*b*).

I do not think that it is incumbent on any person impeaching the validity of a money-lending transaction carried out at a place other than that indicated by the registered address of the money-lender to prove that the latter has carried out many other transactions of the same kind at the same unauthorized place.

In my view, when a registered money-lender, whose business it is to lend money, comes to a place other than his registered address and carries out there a transaction having the characteristics of a genuine business loan of a professional money-lender, it must be taken, in the absence of all evidence to the contrary, that he is carrying on his money-lending business at the latter place. Here the very mischief against which the statute of 1900 was directed was brought about. The appellant was introduced to the respondent as a person ready to lend money. He was induced to deal with him without knowing whether he was a money-lender or not, and without knowing whether he had a registered office or not.

I think that, having regard to all the circumstances of the case, the respondent, by entering into this money-lending transaction on November 24, 1914, at the Blundell Arms Hotel, Formby, did carry on money-lending business at an address other than his registered address within the meaning of s. 2, sub-s. 1 (*b*), of the Money-lenders Act of 1900. In *Kirkwood* v. *Gadd* (1) it was contended by the persons impeaching the security (1.) that every step or stage in a loan transaction must be carried through at the registered address of the lender, and (2.) that as the bill of sale given in that case was executed, and the money lent to the borrower handed to him, at his

(1) [1910] A. C. 422.

own house, the money-lending business was not carried on at the lender's registered address. This House decided against that contention. It was not necessary to decide any other point. It had, however, been contended, on behalf of the respondent, that even if the business of making the loan should be taken to have been transacted at the borrower's residence, still it was only a single money-lending transaction, and that the carrying of it through did not amount to carrying on money-lending business within the meaning of s. 2, sub-s. 1 (*b*). There was nothing amounting to a decision of the House that the carrying through of one money-lending transaction at a given place might not amount to the carrying on of money-lending business at that place within the meaning of the statute. On the contrary, the effect of the decision was, I think, this—that it depended upon the facts and circumstances of each case whether it amounted to that or not. The main point decided in *Whiteman* v. *Sadler* (1) was, as I read the report, this—that a contract made with a money-lender in one of his registered names did not come within s. 2, sub-s. 1 (*c*), because the lender, though wrongly registered in two names, did in fact take from the borrower the security impeached in his registered name—not in an unregistered name.

In the argument in the present case the object aimed at by this latter provision has, I think, been misunderstood. The clause had a special object, namely, this—to require that as far as possible the name of the money-lender should appear, in the written agreement on the face of the documents as a contracting party, in order to prevent these agreements being made in the names of persons who were trustees for the money-lender, or who acted as agents for him as an undisclosed principal. It provided a protection additional to that mentioned in the preceding sub-head of the sub-section against borrowers being induced to deal with the same money-lender under different names, and it secured that transferees or holders of bills and promissory notes and such like securities for money should know who the real lender was. But s. 2, sub-s. 1 (*b*), and s. 2, sub-s. 1 (*c*), are not mutually exclusive. That is the fallacy underlying the respondent's argument. If a money-lender in the conduct of his money-lending business makes a loan in a place other than that indicated by his registered address, and as security for that loan takes

(1) [1910] A. C. 514.

H. L. (E.) 1917

CORNELIUS v. PHILLIPS.

Lord Atkinson.

from the borrower a promissory note of which the money-lender's clerk is the payee, the transaction offends against the provisions of both s. 2, sub-s. 1 (*b*), and s. 2, sub-s. 1 (*c*). Against the first because the money-lender has carried on money-lending business at a place other than that indicated by his registered address; and against the second because the money-lender has taken a security for money in the course of his business as a money-lender otherwise than in his registered name. The argument that, because the form of the document given as security offends against s. 2, sub-s. 1 (*c*), therefore the money-lending transaction, of which the giving of that security forms a part, cannot offend against the provisions of s. 2, sub-s. 1 (*b*), is, I think, altogether unsound.

It is not disputed that the language of sub-s. 1 (*c*) is prohibitive. I think it is clear that if the lender in *Whiteman* v. *Sadler* (1) had not registered his name at all, this House would have applied the principle laid down by Parke B. in *Cope* v. *Rowlands* (2) and by Tindal C.J. in *Fergusson* v. *Norman* (3), and, as the taking of the bill of sale could not have been held to be a collateral matter, have held that security to be void. The words which are said to make the latter clause prohibitive are "shall not enter into . . . . otherwise than his registered name"; but if s. 2, sub-s. 1 (*b*), be thrown into a negative form the sense will remain quite the same, and yet it will be equally prohibitive. It would then run: "shall not carry on the money-lending business in any name other than his registered name nor at any address other than his registered address or addresses." The sense of the clause is in no way altered; yet it is quite as prohibitive as the succeeding clause, while the doing of the thing prohibited is in each case an offence of the same kind and punishable by the same penalties.

The definite article "the" is used in sub-s. 1 (*b*) to refer to the business mentioned in the preceding clause as his (the money-lender's) "business of money-lending." The appellant's account of the transaction must be accepted as accurate, since he is absolutely uncontradicted. I am of opinion that the promissory note dated November 24, 1914, and the whole transaction of which it formed part, was void, and may in addition constitute a crime; that

(1) [1910] A. C. 514. (2) 2 M. & W. 149, 157.
(3) 5 Bing. N. C. 76, 84.

the judgment appealed from was erroneous and should be reversed, and the judgment of Ridley J. dated November 10, 1915, be restored; and this appeal be allowed with costs here and in the Court of Appeal.

LORD PARMOOR. My Lords, the facts in this appeal are not in dispute. On November 24, 1914, the appellant, at the invitation of a friend, Harvey Shelmerdine, entered the Blundell Arms Hotel, Formby, and met the respondent, whom he had not before seen. The respondent was a money-lender, as defined by the Money-lenders Act, 1900, properly registered, and carrying on the money-lending business at his registered address, 33, Crown Street in the city of Liverpool. At this meeting an ordinary money-lending transaction was completed. The respondent drew a cheque for 200*l.* payable to the appellant or order, and the appellant signed a promissory note promising to pay the respondent or order the sum of 300*l.* for value received six months after date. There was therefore a money-lending transaction carried out with a registered money-lender at an address other than his registered address.

It was contended on behalf of the respondent that a single transaction of this character did not amount to a carrying on of the money-lending business so as to bring the respondent within the prohibition of s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, that the money-lender should not carry on the money-lending business at other than his registered address. I think that it is impossible to accept this contention. In my opinion the respondent, in effecting a money-lending transaction with the appellant, was, in the ordinary sense, carrying on the money-lending business, and it is immaterial whether a single transaction or a number of transactions are involved. The business was carried through at an address other than the respondent's registered address, and therefore comes directly within the prohibition of s. 2, sub-s. 1 (*b*). Reference was made to the case of *Kirkwood* v. *Gadd.* (1) This case was decided on a question of fact, that the particular transaction was not impeachable because every stage and every incident of every piece of the money-lending business was not transacted at the registered office, and it does not, in my opinion, affect the matters involved in the present appeal, or give any colour to the view that

(1) [1910] A. C. 422.

H. L. (E.) 1917

CORNELIUS v. PHILLIPS.

Lord Parmoor.

the money-lending business is not carried on at a place where all the stages of a single money-lending transaction are carried through.

The second point argued on behalf of the respondent was that, assuming the money-lending transaction to come within s. 2, sub-s. 1 (*b*), yet on the true construction of the section as a whole it was not thereby rendered an illegal transaction so as to make the contract void. In support of this contention it was said that the case had been determined in favour of the respondent by *Whiteman* v. *Sadler* (1), as decided by a majority in the Court of Appeal. I propose, in the first instance, to consider the construction of the section and then to examine the decision in your Lordships' House. No question arises under sub-s. 1 (*a*), and the respondent had fulfilled his obligation in this respect by a proper registration. Sub-s. 1 (*b*) not only places an obligation on a money-lender to carry on the money-lending business in his registered name and at his registered address, but expressly prohibits him from carrying on that business in any other name or at any other place. If the money-lending transaction at the Blundell Arms, Formby, was a carrying on of the money-lending business by the respondent, as I think it was, the transaction is one which the statute has expressly prohibited. It was argued, however, that sub-s. 1 (*c*) was inconsistent with the inference that the transaction prohibited under sub-s. 1 (*b*) was thereby rendered void as between the parties. Sub-s. 1 (*c*) enacts that the money-lender shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and payment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name. This sub-section has no reference to the address, and, as was pointed out in *Kirkwood* v. *Gadd* (2), any such limitation as applied to the address might render the convenient carrying on of a particular transaction in some cases very difficult. The sub-section, in my opinion, in no way limits the obligations imposed under sub-s. 1 (*b*), but is cumulative in effect, and provides that every agreement made in the course of his business as a money-lender by a money-lender shall not be entered into otherwise than in his registered name, thereby providing that all agreements incidental to the money-lending business with respect

(1) [1910] A. C. 514. (2) [1910] A. C. 422.

to the advance and repayment of money or the taking of security for money shall not be transacted otherwise than in the registered name of the money-lender. It is putting a further restriction on the money-lender as to the use of his registered name beyond that put upon him in reference to the use of his registered address. If the sub-section 1 (*c*) did nothing more than enforce in more specific language obligations which had been placed on a money-lender under sub-s. 1 (*b*) I should not come to the conclusion that it was intended to limit the obligations which sub-s. 1 (*b*) had imposed, but that it was intended to make clear its meaning and ambit. Sub-s. 1 (*d*) is not material. Sect. 2, sub-s. 2, renders a money-lender liable to a fine not exceeding 100*l.* and, in the case of a second or subsequent conviction, to imprisonment if he carries on his business otherwise than at his registered address. The result is that the transaction under consideration in this appeal is prohibited by statute, and renders the money-lender liable to a fine on conviction under the Summary Jurisdiction Acts. The principle of law applicable has been accurately expressed by Farwell L.J. that a contract which is expressly forbidden and made criminal by Act of Parliament can give no cause of action to a party who seeks to enforce it. In *Whiteman* v. *Sadler* (1) Lord Dunedin adds that the same result follows in the case of a contract which is not expressly but only impliedly forbidden. I have therefore come to the conclusion that the appellant is not liable and that his appeal should be allowed, unless the case is governed by the decision in *Whiteman* v. *Sadler*. (1) If it is so governed, the appellant cannot succeed.

The point really decided in the case of *Whiteman* v. *Sadler* (1) is that a money-lender whose name has been placed on the register by the officers of a public department in conformity with regulations purporting to be issued under the authority of Parliament does not become liable to fine and imprisonment and the absolute loss of all his contracts, not for trading without registration, but for trading in a name registered wrongly, but registered by the authorized exponents of the requirements of the Act as statutory custodians of the register. This passage is in substance taken from the opinion of Lord Macnaghten, who says: "If, in violation of the plain words of the Act, a money-lender trades without being regis-

(1) [1910] A. C. 514, 521.

H. L. (E.) 1917 — CORNELIUS v. PHILLIPS. — Lord Parmoor.

tered at all, or being registered trades in another name, he is very properly left to the mercy of any one who chooses to attack him, and his contracts are rightly avoided." In the case with which Lord Macnaghten was dealing the question was one of registered name, but, in my opinion, the passage is equally applicable to a question of registered address. Lord Dunedin states in his opinion: "I think registered name means de facto registered name, and that it would be contrary to all justice to penalize the appellants for what was really a mistake of the Inland Revenue." Lord Dunedin no doubt expresses the opinion that, apart from the question of registration, the contract was only void if it was struck at by the prohibition under s. 2, sub-s. 1 (*c*); but this was not the matter directly in debate, and the noble Lord has expressed his opinion on this point in the present appeal after full discussion. Lord Loreburn expresses his concurrence and that of Lord Ashbourne with the opinions of Lord Macnaghten and Lord Dunedin. Lord James of Hereford withdrew his intended judgment, although entertaining on some points considerable doubt. There is no doubt that the opinion of Lord Mersey does state specifically that there is no express prohibition in either sub-s. 1 (*a*) or (*b*), whereas there is in sub-s. 1 (*c*), but this opinion, although entitled to great weight, was not concurred in by any other of the noble Lords before whom the appeal was heard. I think, therefore, that the question now in appeal before your Lordships is not governed by *Whiteman* v. *Sadler* (1), but is open to consideration on its merits.

My Lords, in my opinion the appeal should be allowed with costs here and below.

Order of the Court of Appeal reversed and order of Ridley J. restored. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House.

Lords' Journals, November 29, 1917.

Solicitors for appellant: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

Solicitors for respondent: *Ford, Lloyd, Bartlett & Michelmore, for Barrell & Co., Liverpool.*

(1) [1910] A. C. 514, 521

[HOUSE OF LORDS.]

THOMPSON . . . . . APPELLANT; H. L. (E.)*
1918
AND
THE KING . . . . . RESPONDENT. Jan. 24.

Criminal Law—Evidence—Charge of Gross Indecency—Alibi—Issue of Identity—Evidence of Possession of Powder Puffs and Indecent Photographs of Boys—Admissibility.

The appellant, who was charged with acts of gross indecency with boys, set up the defence that he was not the man and adduced evidence to prove an alibi. It was proved that the man who committed the offence made an appointment to meet the boys three days later at the time and place where the offence was committed and that the appellant met the boys at the appointed time and place and gave them money. The prosecution tendered evidence that on this occasion, when he was arrested, the appellant was carrying powder puffs and that he had indecent photographs of boys in his rooms :—

Held, that in the special circumstances of the case the evidence was admissible on the issue of identity.

Per Lord Sumner : The case raised "no point of law of exceptional importance," and it was to be regretted that it should have been thought "desirable in the public interest" that an appeal should be brought to the House of Lords.

Order of the Court of Criminal Appeal [1917] 2 K. B. 630 affirmed.

THE appellant was charged with having on March 16, 1917, committed acts of gross indecency with boys, contrary to s. 11 of the Criminal Law Amendment Act, 1885. His defence was an alibi. At the trial the prosecution tendered evidence that on the occasion of the appellant's arrest on March 19 powder puffs were found in his possession and that a number of indecent photographs were found in a locked drawer in his rooms. This evidence was objected to, but the trial judge, Lawrence J., admitted it and the prisoner was convicted.

The appellant appealed against his conviction to the Court of Criminal Appeal on the ground that this evidence had been improperly admitted. The Court (Viscount Reading C.J., Darling and Avory JJ.), affirming the ruling of the learned judge, held that

* *Present :* LORD FINLAY L.C., LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

H. L. (E.) 1918

THOMPSON v. THE KING.

the evidence was admissible on the issue of identity and dismissed the appeal. (1)

The appellant, having obtained the Attorney-General's certificate authorizing the appeal, appealed to this House.

The facts are fully stated in the judgment of the Lord Chancellor quoting the judgment of the Lord Chief Justice.

1917. Dec. 3, 4. *Langdon, K.C.* (with him *Huntly Jenkins* and *E. J. Purchase*), for the appellant. The possession by the prisoner of indecent photographs is evidence of a vicious propensity and shows that he would be likely to have committed the offence charged against him, but such evidence is not admissible to prove that he did commit the offence. This evidence has been admitted on the question of identity alone, but there is no nexus between the possession of these photographs and the crime. There is not a tittle of evidence to connect the photographs with the boys. If housebreaking tools are found in a burglar's house, but have no relevance to the particular crime with which the man is charged, that is merely evidence of the man's burglarious tendency and nothing more. So here the contemporaneous possession of indecent photographs goes to general character only: *Makin* v. *Attorney-General for New South Wales* (2); *Reg.* v. *Harris* (3); *Reg.* v. *Oddy* (4), *Rex* v. *Fisher* (5); *Rex* v. *Cole* (6); *Rex* v. *Bond.* (7) This is not evidence of identification, which has generally been dependent upon physical qualities, and it was not used for that purpose, but was used as corroboration. But if evidence is not relevant in itself it cannot be used as corroboration. The fact that the prisoner had these photographs locked up in a drawer cannot be relevant to the question of his intent when he met the boys on March 19. The evidence as to the powder puffs is no doubt admissible upon the question of that intent, but the prisoner's intent on the 19th is, it is submitted, not relevant to the question of his being the man who committed the offence on the 16th. This matter is before the House simply on the point of law, and if the House should decide that the evidence as to

(1) [1917] 2 K. B. 630.
(2) [1894] A. C. 57, 65.
(3) (1864) 4 F. & F. 342.
(4) (1851) 2 Den. 264.
(5) [1910] 1 K. B. 149.
(6) (Buckingham Sum. Ass. 1910) Cited in Phillipps on Evidence, 10th ed., vol. 1, p. 508.
(7) [1906] 2 K. B. 389, 397.

the powder puffs was admissible but that the evidence as to the photographs was not it has no jurisdiction under s. 4 of the Criminal Appeal Act, 1907, to affirm the conviction on the ground that no substantial miscarriage of justice has resulted from the wrongful admission of the evidence, but it must send the case back to the Court of Criminal Appeal on the question of discretion. Nor can it be maintained here that no substantial injustice has been caused by such wrongful admission: see *Makin* v. *Attorney-General for New South Wales* (1) upon a very similar proviso in a Colonial Act; *Rex* v. *Rodley*. (2)

Sir Gordon Hewart, S.-G. (with him *Travers Humphreys* and *G. A. H. Branson*), for the Crown. Evidence tending to show that the prisoner was likely to commit the offence is inadmissible, but evidence tending to show that the prisoner did commit the offence is admissible, and not the less so because it also tends to show that the man was of a character likely to commit the offence or a man of a vicious mind. This case falls within the rule laid down in *Makin's Case* (3), where Lord Herschell deals with *Reg.* v. *Oddy* (4), which was in fact overruled by statute. And see *Rex* v. *Ball* (5), *Perkins* v. *Jeffery* (6), *Rex* v. *Mackenzie and Higginson* (7), and *Reg.* v. *Ollis*. (8) The fact that these photographs are photographs of boys is material on the issue of identification. As regards the proviso to s. 4 of the Criminal Appeal Act, 1907, the discretion there vested in the Court may be exercised by this House. For that purpose the House stands on the same footing as the Court of Appeal.

Langdon, K.C., replied.

[The following cases were also referred to:—*Dal Singh* v. *King Emperor* (9), *Rex* v. *Dunn* (10), and *Reg.* v. *Rhodes*. (11)

The House took time for consideration.

1918. Jan. 24. LORD FINLAY L.C. My Lords, this is an appeal, with the sanction of the Attorney-General, from a decision of the

(1) [1894] A. C. 57, 68-70.
(2) [1913] 3 K. B. 468.
(3) [1894] A. C. 57.
(4) 2 Den. 264.
(5) [1911] A. C. 47.
(6) [1915] 2 K. B. 702.
(7) (1910) 6 Cr. App. R. 64, 73.
(8) [1900] 2 Q. B. 758, 781.
(9) (1917) L. R. 44 Ind. Ap. 137.
(10) (1826) 1 Mood. 146.
(11) [1899] 1 Q. B. 77.

H. L. (E.) 1918

THOMPSON v. THE KING.

Lord Finlay L.C.

Court of Criminal Appeal affirming the ruling of Lawrence J. that certain evidence was admissible.

The facts are sufficiently stated in the following paragraphs from the judgment of the Lord Chief Justice :—

" The appellant was convicted of committing acts of gross indecency with two boys, and also of assaulting a police constable.

" He appeals against the conviction on the grounds that (*a*) the judge wrongly admitted evidence which was not relevant to any of the offences charged in the indictment ; and (*b*) the judge misdirected the jury by telling them that they might take this evidence into consideration. If the evidence was admissible, no complaint can be made of the direction to the jury ; therefore the sole question in this appeal is whether this evidence was or was not admissible.

" It was not disputed at the trial or on this appeal that the offences had been committed with the boys. The defence was that the appellant was not the person who committed them, and that he was elsewhere on the day and at the time in question.

" For the prosecution there was a body of evidence identifying the appellant. One boy had seen him and spoken to him about a month before ; both boys identified him as the man who on March 16 did the acts complained of, and gave them money and told them to meet him again on the Monday, March 19. Both boys went on the Monday to the appointed place, and saw the appellant, who was accompanied by two other persons. He told the boys he had business that day, and had no time, that they were to go away, and that the tall man was a policeman. He gave one boy two shillings to divide with the other. The police, who had been informed of the events of March 16, and were present to watch on March 19, then intervened. The boys thereupon told their story in the presence of the appellant, who made no reply, but struck the police officer and endeavoured to run away.

" At the trial the appellant and other witnesses gave evidence on his behalf to establish an alibi on March 16. It was not in dispute that he saw and spoke to the boys on March 19. His story was that on this day he saw the boys following him, that he went into a shop and saw them again as he left it, and that he then told them to go away, gave them a coin out of his pocket without looking at it,

and told them to buy soap and get their faces washed. At the police court he said he was not guilty and had never set eyes on the boys before his arrest.

"During the course of the trial evidence was tendered by the prosecution to prove that, when the appellant was arrested on March 19, two powder puffs were found upon him, and that in a drawer in one of the rooms where he lived photographs of boys were found, including twelve separate photographs and ten pasted in an album of naked boys in various attitudes. Objection was raised to the admissibility of this evidence on the ground that none of these articles was connected with any charge on the indictment, and that the evidence could only serve to prove that the appellant was a person of evil character or disposition with regard to boys, and therefore was a person likely to commit the offence. After argument the learned judge admitted the evidence as tending to corroborate the evidence of identification of the appellant. The appellant by his evidence sought to explain that these photographs had come into his possession for the purpose of artistic study, that he had spent nine months in Italy studying sculpture, and had acquired most of the photographs there. Having regard to the verdict of the jury and the examination by the Court of the photographs, we must take it that these photographs are not of an innocent but are of an objectionable character."

The Court of Criminal Appeal dismissed the appeal, and I think they were right.

The charge on which the prisoner was tried was in respect of the offence proved to have been committed on March 16. The defence of the prisoner was that these acts must have been committed by some other man, as he was at another place altogether at the time when the acts were committed on the 16th.

The whole question is as to the identity of the person who came to the spot on the 19th with the person who committed the acts on the 16th. What was done on the 16th shows that the person who did it was a person with abnormal propensities of this kind. The possession of the articles tends to show that the person who came on the 19th, the prisoner, had abnormal propensities of the same kind. The criminal of the 16th and the prisoner had this feature in common, and it appears to me that the evidence which is objected

H. L. (E.) 1918

THOMPSON v. THE KING.

to afforded some evidence tending to show the probability of the truth of the boys' story as to identity.

In my opinion Lawrence J. was right in admitting the evidence, and this appeal should be dismissed.

LORD DUNEDIN. My Lords, the law of evidence in criminal cases is really nothing more than a set of practical rules which experience has shown to be best fitted to elicit the truth as to guilt without causing undue prejudice to the prisoner. That being so, I should hesitate long before I ventured to interfere with a unanimous judgment of a Court of learned judges who are daily engaged in the practice of the criminal law; but, apart from this, to me, weighty consideration, I entirely agree with the reasoning contained in the judgment of the learned Lord Chief Justice and I accordingly concur.

LORD ATKINSON. My Lords, in argument in this case it has occasionally been forgotten, I think, that the point for decision is the admissibility of these photographs in evidence on the issues raised for the decision of the jury, and not their weight as evidence. If a document be found either on the person of, or in the room occupied by an accused person bearing directly on the crime charged against him, but undated, and there be no evidence to show when it came into his possession, or when it was written or printed, it might be urged, as it was urged in this case, that it might have come into possession when he was young and foolish, and that, even if his character was then ever so depraved or reckless or criminal as the possession of the documents might indicate, he may have long since repented and reformed and become of blameless life and character. All that may be perfectly true, but that possibility goes, I think to the weight of the evidence, not to its admissibility. Again, it seemed sometimes as if it was almost contended in argument that the state of a person's mind or feelings at or before the time when the crime of which he stands charged was committed can never be given in evidence against him to show not merely quo animo he did the act charged, but that in fact he did that act. In a case of homicide, for instance, evidence is admissible to prove that the accused entertained feelings of hatred towards, or a desire

to be revenged upon the deceased, in order to prove that he killed the deceased, not merely quo animo he did so; and again, in cases of robbery or embezzlement, the need of money or the greed for money may be proved in evidence to show that the accused who had that need, or entertained those feelings of greed, committed the crime. These things are not the less states of mind and feeling because they are described as motives for the commission of the crime.

It is not disputed that the general principles upon which evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is admissible are correctly laid down in the judgment of Lord Herschell in *Makin* v. *Attorney-General for New South Wales*. (1) This evidence may be given if it be relevant to an issue raised before the jury, and it may be relevant if it bears upon questions whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. Lord Herschell added: "The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other." Several cases have been cited in argument which are little more than instances in which the difficult task alluded to by Lord Herschell has been accomplished or has been failed in, and the evidence tendered has been placed upon one side or other of the line by the different Courts before which the cases came. I think, however, the Solicitor-General was quite justified in contending that the admissibility in evidence of these indecent photographs of naked boys of different ages must be determined when they are taken in connection with all the facts and circumstances proved in the case. The two boys proved not only that the accused had, on March 16, in the urinal near the Turnham Green Railway Station committed the offence charged and had given them one shilling each, presumably as a reward for what they had done to him, or permitted him to do to them, but when leaving them after the commission of the crime had asked them to meet him at the same place, Turnham Green Railway Station, at the same time on the following Monday, the 19th, "to do it again"; that they accordingly went to the same place about the same time on the following

(1) [1894] A. C. 57, 65.

H. L. (E.) 1918 THOMPSON v. THE KING. Lord Atkinson.

Monday and found the prisoner there talking to two men; that he made a sign to them with his head; that they followed him and waited for him when he went into a shop; that after he had parted from his friends they followed him again, when he told them to go away, and said he had not time that day (a most significant expression); that he had some business to do; that he then gave them a two-shilling piece, the same amount as before, and again said "Go away," adding "That tall man," pointing to Sergeant Blackmore, "is a policeman" (another most significant expression). These two significant expressions tend to show that he met those boys with an intention to do something with which the police might interfere. If what he had not time to do was innocent why should the presence of the police be feared? That the prisoner gave the two boys a two-shilling piece is admitted by him; it could not well be denied, as the gift took place almost in the presence of the detective policeman Sergeant Weston, who, when examined, proved that on the 19th he saw the accused in company with two gentlemen near the level crossing of the railway near Turnham Green Railway Station; that he saw the boys following these gentlemen, and saw the accused turn round and make a motion of his head at the boys; that subsequently the prisoner parted from his two friends, then crossed the road to where the two boys were standing, entered into conversation with them for a few moments; that he then saw him (the prisoner) take something from his pocket and hand it to the boys; that he then rushed up and said to the prisoner, "I am a police officer. What are you doing to these boys?" To which the prisoner replied, "I have not spoken to any boys."

The boy Jones, in the presence of the prisoner and Sergeant Weston, made the following statement to which the prisoner made no reply whatever:—"He (the prisoner) gave us two shillings. He said 'It's no use to-day; that tall man (pointing to Sergeant Blackmore) is a policeman.' He had arranged to meet us at three o'clock. He took us to the urinal near the Bath Road on Friday last"; that on the way to the station house the prisoner said, "I did give the boys two shillings; I can give money to whom I like." At the police station Weston stated he told the prisoner he would be charged with attempting to procure these two boys to commit an act of gross indecency, and also with actually committing such an

act on March 16 with male persons in a public urinal, and further with assaulting Weston himself; that when the charges were being read over to him he said, "As to the first two charges I do not say anything. I do not think I struck you. I did not mean to hurt you."

During the progress of the case it was suggested in cross-examination, as it was afterwards deposed by the prisoner, that he was not in the Turnham Green urinal on March 16, and that anything which took place between him and these boys on the 19th was as far as he was concerned quite innocent. These were his defences.

Now, even on the evidence of the police alone, the prisoner was brought into strange, and, having regard to the giving of two shillings and his silence when Jones told his story in his presence, into most suspicious, relations with these boys on this March 19. The transactions of that day are so connected with those of March 16, that if his intent on the 19th was to commit, or endeavour to induce the boys to commit, on that day any act of indecency it would, in my view, be strong evidence to prove that he was the very man who committed the offences charged on the 16th, and that the boys were not making any mistake whatever in their identification of him. It would be strange, indeed, if one man should commit with the boys the offence charged on the 16th, and make an assignation with them to commit it again upon the 19th, that another man should, with an intent to do the same, take up and fulfil the first man's engagement, personate him as it were, and keep the appointment the first had made. It would appear to me that evidence which goes to prove that the prisoner had in his transactions with these boys on the 19th an intent or desire to commit an indecent offence with them, if circumstances should permit, becomes evidence to identify him as the person who actually committed on the 16th the offence for which he was indicted. Apparently the prisoner himself fully appreciated this, for while he stated that the boys did follow him, stared into his face, waited for him while he was in the shop, and watched him through the window, yet he gave them two shillings and told them to go away as the tall man, pointing to a man, was a policeman. The tall man he pointed to was, he said, not Sergeant Blackmore, but one of his own friends, and that he then told them they should wash their dirty faces. The contest then narrows it down to this: Were the sets of acts deposed to in the main by each side

H. L. (E.)
1918
THOMPSON
v.
THE KING.
Lord Atkinson.

as having taken place on the 19th done with the wicked intent the prosecution alleges, or with the innocent intent the prisoner in his defence alleged? When he is searched powder puffs are found on his person. It is stated that powder puffs are some of the things with which persons who commit abominable and indecent crimes with males furnish themselves for the purpose of carrying out their criminal designs. For what purpose could the prisoner carry upon him on this day the powder puffs? He could not, by them, promote the cause of charity or cleanliness. He could not have carried them for such a purpose—the time had not arrived for their use; but can it be reasonably doubted that they were carried to be used when needed? The possession of them is in my opinion admissible in evidence to show, when taken in connection with the facts proved, that the prisoner harboured on that day an intent to commit an act of indecency with these boys should occasion offer. Well, if these photographs of naked boys, some when apparently approaching adolescence, all I think indecent in their attitude, and some apparently depraved in suggestion, had been found on the person of the accused I do not see how any distinction could well have been drawn between them and the powder puffs. They too are, it is stated, implements for carrying out the same design. I do not know, and it is not stated, whether they are used to stimulate the depraved lusts of those given to such practices, or to corrupt the mind of those whose assistance or sufferance such people seek; but this I think is clear, that they could not be needed for the work of a hygienic enthusiast so devoted to youthful cleanliness that he gave to two boys he had never met before, and who had teased him by staring at him, two shillings to get their dirty faces washed. The fact that they were found in the prisoner's drawer and not on his person may make them less cogent evidence of a criminal intent towards these boys than if they had been found upon his person; but still, in my view, the possession of them is some evidence of the existence of a criminal intent towards these boys on March 19, and, if so, some evidence of the identity of the person harbouring that intent with the person who had committed the crime charged upon March 16. I think they belong to the class of evidence mentioned by Lord Herschell in *Makin's Case* (1), namely, evidence designed and

(1) [1894] A. C. 57, 65.

intended to rebut a defence which would be otherwise open to the accused—in this case an alibi for March 16. In my opinion, therefore, the appeal fails and should be dismissed.

LORD PARKER OF WADDINGTON. (1) My Lords, I also have come to the conclusion, though with some hesitation, that the evidence in question was admissible. I think, however, that it was admissible on one ground only. The real issue was the identity of the accused with the man who committed the crime of March 16. If the abnormal propensity of the criminal of March 16, manifested by the nature of the crime and the appointment for its repetition, can be regarded as one of the indicia by which his identity can be established, the evidence is admissible as showing that the accused had the same abnormal propensity. For the reasons about to be explained by my noble and learned friend Lord Sumner, I have come to the conclusion that it may be so regarded. But it would, in my opinion, be wrong to treat your Lordships' decision in the present case as laying down any principle capable of general application.

LORD SUMNER. (2) My Lords, the question in this appeal is whether either the powder puffs or the photographs or both were admissible in evidence to prove the identity of the appellant with the person who committed the offences against the Criminal Law Amendment Act, 1885, s. 11, on March 16, 1917. The facts most material to be borne in mind are as follows :—

(1.) If Maunders and Jones told the truth, at all, they proved the crime up to the hilt. There was no question open as to intent or mens rea. There was no possible appearance of innocence which might need to be rebutted. The nature and quality of the acts were unequivocal.

(2.) Neither the objects in question nor any similar objects were used, produced, or mentioned on March 16, nor were they or any such objects shown to have been on the person of the man who committed the crime on that day.

(3.) Of these objects the judgment under appeal observes : " It is well known to those who have experience of these cases, that

(1) Read by Lord Atkinson. (2) Read by Lord Dunedin.

H. L. (E.) 1918 THOMPSON v. THE KING. Lord Sumner.

persons who commit abominable crimes or acts of gross indecency with male persons make use of appliances such as powder and powder puffs, and implements such as objectionable pictures for the purpose of carrying out their designs." I accept this without discussion.

(4.) There were found shortly afterwards by the police in a locked drawer in the appellant's room a few ordinary portrait photographs, and along with them about a score of others, as to which it was admitted that they showed the appellant to be a person of depraved mind. All were photographs of boys.

(5.) After committing the offences on March 16, the criminal made an appointment with the boys for March 19, at the time and place where he had first met them on March 16. When they kept that appointment the appellant was there or thereabouts. He had the powder puffs with him.

No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime ; but, sometimes for one reason sometimes for another, evidence is admissible, notwithstanding that its general character is to show that the accused had in him the makings of a criminal, for example, in proving guilty knowledge, or intent, or system, or in rebutting an appearance of innocence which, unexplained, the facts might wear. In cases of coining, uttering, procuring abortion, demanding by menaces, false pretences, and sundry species of frauds such evidence is constantly and properly admitted. Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice. No doubt it is paradoxical that a man, whose act is so nakedly wicked as to admit of no doubt about its character, may be better off in regard to admissibility of evidence than a man whose acts are at any rate capable of having a decent face put upon them, and that the accused can exclude evidence that would be admissible

and fatal if he ran two defences by prudently confining himself to one. Still, so it is. In the present case, even before the justices, it became clear that the accused made one case, and one case only, and so it has been throughout. He said that he was not the man.

It has been argued that the evidence in question went to another issue than that of identity, namely, to corroboration. I think when examined this will be found to be a fallacy. Evidence to corroborate Maunders and Jones, in view of their participation in the conduct in question, was duly given and no point of this kind was raised, but it was said that the fact that the man whom the boys identified was a person who had in his possession these incriminating objects tended to confirm their accuracy and to show that they had made no mistake. As it seems to me, this is only another way of saying that the possession itself goes to prove identity. That the boys should pick out as the guilty person some one who, unknown to them, possessed these objects confirms their accuracy, if such possession is one of the personal indicia of the guilty man, for it shows that they selected a man who so far corresponds to the man who was wanted. If not, it only shows that, although he may not be the right man, he is probably quite as bad. Their evidence is confirmed by the possession only if the possession is itself direct evidence of identity.

As was admitted, there was a stronger case for the admissibility of the powder puffs than of the photographs. I think the powder puffs were clearly admissible. The criminal made an appointment with the boys for the following Monday, and to the place of that appointment at the appointed time there came the appellant, equipped with articles recognized by the Court as "used for the carrying out of their design" by persons of the class to which the criminal belonged. They are direct evidence that the appellant was keeping the criminal's appointment and was the same man. This only makes the admissibility of the photographs more critical. No jury could fail to be influenced by the discovery of them in the accused's possession, and hence the discretion given by the proviso in s. 4 of the Criminal Appeal Act, 1907, could not be exercised in respect of them. The Court below did not purport to exercise that discretion; their decision was that the appeal should be dismissed. The question before your Lordships is whether that decision was right. The statute which creates the Court of Criminal Appeal

H. L. (E.) 1918 THOMPSON v. THE KING. Lord Sumner.

and also creates your Lordships' jurisdiction in appeal from that Court confers no original discretion on your Lordships, but on the Court of Criminal Appeal only, and it is not, in my opinion, open to contention, though it was suggested for the respondent, that your Lordships, even if you were minded to do so, could now say that you "consider that no substantial miscarriage of justice has actually occurred" from the trial of the appellant upon such evidence, if it be inadmissible.

The photographs thus become the turning point of the case. The principles on which the admissibility of evidence of identification rest are in no need of restatement. Indeed, new formulæ on so trite a topic may tend to introduce qualms or doubts. The question is always not so much what is proved as what it proves. All lawyers recognize, as part of their professional premisses, that there is all the difference in the world between evidence proving that the accused is a bad man and evidence proving that he is *the* man. Laymen are apt to think that the difference, if any, is in favour of admitting the former. There must be something to connect the circumstance tendered in evidence, not only with the accused, but with his participation in the crime. It is this something which is expressed in the judgment under appeal in the words "ordinary men do not keep indecent photographs of naked boys in their possession. Men who commit the offences charged do . . . . The man who did the acts on March 16 was a man who would be likely to have such photographs in his possession. The man arrested on the 19th in fact had such photographs in his possession at his rooms." Illustrations, it is true, were employed during the argument, both at your Lordships' Bar and in the Court below, and I think in one passage in the judgment, which went considerably beyond the limits of admissibility, but as applied to the facts of the case I think the meaning of the above passage may be restated more fully as follows: The actual criminal made an appointment to meet the same boys at the same time and place three days later and presumably for the same purpose. This tends to show that his act was not an isolated act, but was an incident in the habitual gratification of a particular propensity. The appellant, as his possession of the photographs tends to show, is a person with the same propensity. Indeed, he went to the place of the appointment with some of the outfit, and

he had the rest of it at home. The evidence tends to attach to the accused a peculiarity which, though not purely physical, I think may be recognized as properly bearing that name. Experience tends to show that these offences against nature connote an inversion of normal characteristics which, while demanding punishment as offending against social morality, also partake of the nature of an abnormal physical property. A thief, a cheat, a coiner, or a housebreaker is only a particular specimen of the genus rogue, and, though no doubt each tends to keep to his own line of business, they all alike possess the by no means extraordinary mental characteristic that they propose somehow to get their livings dishonestly. So common a characteristic is not a recognizable mark of the individual. Persons, however, who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity. So expanded and understood, I accept the passage which I have quoted above, and think that the photographs, found as they were and after a short interval of time, tend to show that the accused had this recognizable propensity, which it was shown was also the propensity of the criminal of March 16. It was accordingly admissible evidence of his identity with that criminal. Its weight was for the jury. No doubt it required considerable discretion in introducing it at all and a careful direction from the learned judge, but it is admitted that this was given in unexceptionable terms.

My Lords, if the person who committed the offence had, either by word or conduct, established any connection between what passed on that occasion and the photographs themselves, their admissibility, found as they were so soon afterwards, would present no difficulty. If, on the other hand, there had been nothing to show a propensity in the criminal to the practice of such acts, such as the making of the appointment, I should have thought that the photographs were merely objects going to the accused's bad character and not to his identity with the criminal in the particular case. I certainly do not think it could be held that, as a matter of course, even in the case of crimes of this class, the articles found in a man's possession, not as parts of the transaction which is being inquired

H. L. (E.) 1918

THOMPSON v. THE KING.

Lord Sumner.

into, but at a separate time and place, could, as such, be put in evidence against him merely because they were such as criminals possess or use, and in the absence of any circumstance in the crime tending to show a specific connection between it and the articles in question. If a man could be convicted of a particular burglary, in which it was clear that no tools had been used at all, merely because at another place and time burglar's implements were found on his premises, it is difficult to see what limit could be put to the admissibility of general evidence of bad character, and the fact that evidence of articles found on the premises of accused persons is constantly given without much question, though I doubt not in the vast majority of cases quite rightly, is really only misleading, unless at the same time we ask the question what exactly does this purport to prove and by what probative nexus does it seek to prove it.

My Lords, in the view I take of this case no "point of law of exceptional public importance" arises, and I cannot help regretting that it should have been thought to be "desirable in the public interest that a further appeal should be brought." The certificate of the Attorney-General, which is the condition precedent to an appeal to your Lordships' House from a decision of the Court of Criminal Appeal, is granted in his discretion and is the subject neither of review nor of criticism, but I hope that other persons in like position to the appellant's will not be encouraged by this case to attempt to obtain such a certificate on similar grounds. The question here is, and is only, whether, in particular and peculiar circumstances, the finding of these articles could be given in evidence. It raises no new principle of law; it elucidates no new aspect of familiar principles. It is a mere question of the application of the rules of evidence to this particular case. That such application often gives rise to difficulties we all know, but they have to be solved ambulando, and no discussion of them on appeal will lead to the formulation of any rule that will go beyond those in general use. I think that the evidence was admissible, and that the appellant was rightly convicted.

LORD PARMOOR. (1) My Lords, it is not necessary to restate the facts in this case. It is a recognized principle of the criminal law

(1) Read by Lord Shaw of Dunfermline.

that, apart from special conditions or statutory enactment, evidence is not admissible merely to prove that the person accused has a general propensity to commit a crime similar in character to that with which he is charged: *Makin* v. *Attorney-General for New South Wales* (1); *Reg.* v. *Oddy* (2); *Rex* v. *Cole* (3); *Rex* v. *Bond.* (4) It is of great importance that this principle should be maintained to ensure a fair trial in criminal cases. On the other hand, such evidence is admissible if there is any connecting relationship between it and the particular crime with which a prisoner is charged. If such evidence is admissible, it cannot be excluded on the ground that it may incidentally introduce considerations which may tend to prejudice the trial of the person accused. It is not desirable to attempt an exhaustive definition, and it has been more than once pointed out by experienced criminal judges that the difficulty arises not in the enunciation of the general principle but in its application to the circumstances of a particular trial. The case of *Makin* v. *Attorney-General for New South Wales* (1) decides that evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is admissible if it bears upon the question whether the acts alleged to constitute the crime in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. It has been pointed out that before evidence is admissible to rebut a defence such defence should, in some form, have been put forward on behalf of the accused, but no difficulty arises under this head in the present appeal. The defence set up was mistaken identity, and if the evidence objected to is relevant to this issue it is admissible. It would not be admissible on an issue whether the crime was designed or accidental, since no such issue was involved in the trial.

It was incumbent on the prosecution to prove that the acts of indecency had been committed and that the accused had committed them. Under the first head there is no question; under the second the accused denied that he was the person who had committed the indecent acts and called evidence to prove that he was elsewhere on the day and at the time in question. The question in debate is

(1) [1894] A. C. 57.
(2) 2 Den. 264.
(3) (Mich. T. 1810) Cited in Russell on Crimes (6th ed.), vol. 3, p. 403, note (*r*).
(4) [1906] 2 K. B. 389.

H. L. (E.) 1918 THOMPSON v. THE KING. Lord Parmoor.

whether, under all the surrounding circumstances of the particular case, there is any connecting relationship between the evidence to which objection has been taken and the crime with which the accused was charged.

In my opinion there is a difference on the question of admissibility of evidence between the powder puffs and the photographs. The powder puffs were found upon the accused when arrested immediately after his meeting with the boys on the 19th, and corroborate the evidence of the boys that the accused was the person who, after committing the offence on the 16th, had arranged to meet them for a similar purpose on the 19th. This evidence is sufficiently connected with the crime charged in the indictment and is not merely evidence of criminal propensity. Mr. Langdon, however, directed his main argument not to this point, but to the production of the photographs, and it is under this head that the difficulty arises. I do not think that this difficulty is met by a reference to analogous cases, such as burglary. It must be determined on the special circumstances of the particular case.

If there had been no appointed meeting on the 19th, the evidence would, in my opinion, not have been admissible. The issue would then have been, did the evidence of the boys establish the identity of the accused? The prosecution could not then competently have produced the photographs, since there was no connecting relationship of any kind with the crime charged, however much the photographs might tend to show a criminal propensity towards a crime similar to that charged against the accused. The point, however, arises whether the photographs became admissible, and the necessary connection is established in consequence of the meeting on the 19th. The meeting on the 19th following the appointment made on the 16th, implies that the person accused of the indecent acts on the 16th was a person of criminal propensity to commit such an offence as was charged in the indictment. If this is so, the person who committed the offence on the 16th may be identified as a person of criminal propensity to commit such an offence as was charged in the indictment. I accept the statement that the photographs, to which objection was taken, are evidence that the person in whose lodgings they were found was a person of criminal propensity to commit the offence charged in the indictment. The conclusion from these

H. L. (E.) 1918 THOMPSON v. THE KING. Lord Parmoor.

premisses is that the photographs are admissible as evidence of identification and to rebut the case set up by the accused that he was elsewhere on the day and at the time in question. My Lords, I have come to the conclusion that under the special circumstances of this case the photographs were admissible as evidence against the accused. It is not alleged that the learned trial judge in any way misdirected the jury.

My Lords, the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, January 24, 1918.

Solicitor for appellant; *Harry Wilson.*
Solicitor for respondent: *The Treasury Solicitor.*

[HOUSE OF LORDS.]

H. L. (E.)* 1918 *Jan.* 25.

HUGH STEVENSON AND SONS, LIMITED . APPELLANTS;

AND

AKTIENGESELLSCHAFT FÜR CARTON-NAGEN-INDUSTRIE . . . . . RESPONDENTS.

Alien Enemy—Partnership—Outbreak of War—Dissolution of Partnership—Rights of Alien Enemy—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 42.

An English company and a German company carried on a partnership business in England until the outbreak of war between Great Britain and the German Empire, which operated as a dissolution of the partnership. After the outbreak of the war the English company continued to carry on the business and to use the partnership plant for that purpose:—

Held, that the German company were entitled to a share of the profits made after the dissolution by the carrying on of the business

* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD PARMOOR.

H. L. (E.)
1918
HUGH STEVENSON AND SONS v. AKTIEN-GESELL-SCHAFT FÜR CARTON-NAGEN-INDUSTRIE.

by the English company with the aid of the German company's share of the capital.

Decision of the Court of Appeal [1917] 1 K. B. 842 affirmed.

APPEAL from an order of the Court of Appeal (1) varying a judgment of Atkin J. (2)

The appellants (hereinafter called the English company) were a limited company incorporated in England under the Companies Act, 1862, and carried on business in Manchester.

The respondents (hereinafter called the German company) were a company incorporated according to the laws of Germany and carried on business at Dresden.

Under an agreement of November 22, 1906, made between the English company and the German company, the German company became partners in a business carried on in Manchester in the name of the English company alone, and this agreement remained in force until the outbreak of war between Great Britain and the German Empire on August 4, 1914, which operated as a dissolution of the partnership. After the outbreak of the war the English company continued to carry on the business and to use the partnership machinery for that purpose.

The question raised by this appeal was whether the German company were entitled at their option to a share of the profits of the business made since the dissolution or to interest on the amount of their share of the partnership assets in accordance with the provisions of s. 42 of the Partnership Act, 1890, or were only entitled to the value of their share in the partnership as of the date of August 4, 1914.

Atkin J. took the latter view and held that the German company were not entitled to any of the profits of or interest in the capital of the partnership since the date of the outbreak of the war.

The Court of Appeal by a majority (Swinfen Eady and Bankes L.JJ., A. T. Lawrence J. dissenting) reversed the decision of the learned judge upon this point, and held that the German company were entitled to a share of the profits made since the dissolution, so far as attributable to the use of their share of the capital.

The facts are fully stated in the judgment of the Lord Chancellor.

(1) [1917] 1 K. B. 842. (2) [1916] 1 K. B. 763.

1917. Nov. 2, 5. *Leslie Scott, K.C.*, and *H. E. Wright* (for *G. F. Spear* serving with His Majesty's Forces), for the appellants.

By the dissolution of a partnership on the outbreak of war by reason of one of the partners being an alien enemy the contractual relationship between the parties is completely and finally severed for all purposes, and the provisions of the Partnership Act, 1890, with reference to a dissolution of partnership have no application. The right of the outgoing partner, where the business is carried on by the continuing partners, to such a share of the profits as is attributable to the use of his share of the partnership assets, as provided by s. 42 of the Partnership Act, 1890, is dependent upon the continuance of the contractual relationship between the parties until the winding up has been completed. The jurisdiction in equity in the winding up of partnerships is based upon the existence of that contractual relationship : *Butchart* v. *Dresser*. (1) Moreover, the continuing partner has no power to bring the outgoing enemy partner before the Court for the purposes of the winding up : Dicey on the Conflict of Laws, 2nd ed., pp. 217, 222. It follows that the rights of the parties are to be ascertained immediately after the dissolution of the partnership by the outbreak of war and that there is no right in an enemy subject to have interest accruing in his favour during the war. It has been held in America that interest on a loan made previously to the outbreak of war but maturing afterwards, whether the interest be stipulated for by the contract or be allowed by law, ceases to run during the period of the war : *Hoare* v. *Allen* (2) ; *Brown* v. *Hiatts* (3) ; and the ground of decision is thus stated by Field J. in the latter case : " As the enforcement of contracts between enemies made before the war is suspended during the war, the running of interest thereon during such suspension ceases. Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention, and it would be manifestly unjust to exact such compensation, or damages, when the payment of the principal debt was interdicted." Those two cases represent the American law on the subject, and they were based upon what the judges regarded as the common law of England. The only English authority on

(1) (1853) 4 D. M. & G. 542. (2) (1789) 2 Dall. 102.
(3) (1872) 15 Wall. 177, 185.

H. L. (E.) 1918 — HUGH STEVENSON AND SONS v. AKTIEN-GESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE.

this question of interest is a dictum of Lord Tenterden in *Du Belloix* v. *Lord Waterpark* (1) to the same effect as the American decisions. *Wolff* v. *Oxholm* (2) is irrelevant. The principle of the American decisions applies where on the continuance of the business after the dissolution the outgoing partner under s. 42 of the Partnership Act, 1890, has the option of claiming a share in the profits of the business or interest on the amount of his share of the partnership assets. Upon a dissolution of a partnership brought about by normal causes, where the continuing partner retains the whole assets of the firm in the trade, he must account to the outgoing partner for a share of the profits attributable to the employment of the partnership capital, on the principle laid down in *Crawshay* v. *Collins* (3) and *Vyse* v. *Foster* (4) and stated in Lewin on Trusts, 12th ed., p. 308, but that principle has no application to a dissolution due to the outgoing partner having become an alien enemy. The law of this country draws a distinction between property and contract. The property of an enemy subject is not confiscated, but the carrying on of a business for the benefit of the enemy is prohibited. The question at issue in this case is not one of property but of contract. The English partner cannot be made responsible for anything more than for handing over to the enemy partner the value of his share in the partnership as at the date of the outbreak of war, and the enemy has no continuing share in the profits, because that is to force upon the continuing partner a relationship which is totally inconsistent with a state of war.

Schiller, K.C., and *Cecil W. Lilley*, for the respondents, were not called upon.

The House took time for consideration.

1918. Jan. 25. LORD FINLAY L.C. My Lords, the appellants are a limited company incorporated under English law, and the respondents are a German trading corporation. The two companies traded in England in partnership and carried on a business described as a clamp factory. It consisted in the manufacture and sale of metal edges for securing cardboard boxes. The partnership business

(1) (1822) 1 Dow. & Ry. 16, 19.
(2) (1817) 6 M. & S. 92.
(3) (1808) 15 Ves. 218, 226, 229.
(4) (1874) L. R. 7 H. L. 318.

was carried on under an agreement in writing dated November 22, 1906. Clause 2 provided for its remaining in force for five years from January 1, 1907, and thereafter till the expiration of six months' notice by either party. Clause 3, 4, 5, 6, and 7 related to an agency business quite distinct from the partnership business with which alone the present case is concerned. The partnership business was regulated by clauses 8 to 15. Nothing turns on the details of these arrangements, and it is only necessary to observe that clause 12, as to the sale of the machinery on dissolution, has no application in the present case, as the operation of that clause is confined to dissolution by effluxion of time or notice under clause 2. The remaining provisions of the agreement are for the present purpose immaterial.

On August 4, 1914, war broke out between this country and Germany, and it is admitted that the effect of the war was to dissolve the partnership at once.

The dispute in the present case turns on the question what is to be done in respect of the respondents' share in the machinery belonging to the partnership and used in carrying it on.

The appellants continued to carry on the business which had been that of the partnership and used the machinery for the manufacture of the clamps. On June 21, 1915, the appellants commenced an action under the Legal Proceedings against Enemies Act, 1915 (5 Geo. 5, c. 36), asking for a declaration that the plaintiffs should account for the machinery at the price at which it stood in the books of the partnership on August 4, 1914, or, alternatively, at its value on that date.

The case was tried by Atkin J. on February 8, 1916. He gave judgment, making the following declaration with regard to the partnership: "That the partnership constituted by the said contract was dissolved on the said August 4, 1914; that the defendants are entitled to the value of their share in the said partnership including the goodwill, if any, as of the date of August 4, 1914; that clause 12 of the said contract is not applicable; and that the defendants are not entitled to any of the profits of or interest in the capital of the partnership since August 4, 1914."

The effect of Atkin J.'s judgment was that he held that the respondents were entitled to the value of their share in the property

H. L. (E.) 1918 — HUGH STEVENSON AND SONS v. AKTIEN-GESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE. — Lord Finlay L.C.

of the partnership as on August 4, 1914, but were not entitled to any of the profits of or interest in the capital of the partnership since August 4, 1914. In other words, he held that the English company were entitled to use the machinery for the purposes of the business without making any allowance to the German partner for the use of his interest therein.

The German partner is, of course, not entitled to any payment so long as the war lasts, but the declaration of Atkin J., if it stands, would prevent his getting, on the conclusion of peace, anything beyond the capital value of his interest in the machinery at the date of dissolution.

The Court of Appeal were divided in opinion. A. T. Lawrence J. agreed with Atkin J., while Swinfen Eady L.J. and Bankes L.J. held that the right to some allowance in respect of the use by the plaintiffs of the German company's interest in the machinery should not be excluded altogether. The Court of Appeal accordingly reversed Atkin J.'s judgment and substituted for the declaration made by him, and above quoted by me, the following: "Declaration 3.—That the partnership constituted by the said contract was dissolved on the said August 4, 1914, that the defendants are entitled to their share in the said partnership, including the goodwill (if any), and that clause 12 of the said contract is not applicable."

From that decision the present appeal has been brought.

In my opinion the decision of the majority of the Court of Appeal is right. It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits which it may have borne in the meantime. The question to be determined in the present case does not depend upon any contract, but on the rights of property which both partners have in the assets of the firm. The enemy partner was entitled to the value of his share in the machinery. If that amount had been ascertained on August 4, 1914, it would have been retained in custody, and if it had been invested, as in ordinary course it would have been, the enemy partner would on the conclusion of peace have been entitled to the principal with any interest or dividends which had accrued in the meantime.

What took place here was that the English partner continued the business, using the machinery to earn profits. The German partner is, of course, not entitled to any share of the profits attributable to the skill or industry of the English partner, but some portion of the profits may be attributable to the machinery used, and the enemy partner would be entitled to some allowance in respect of his interest therein. Or to put the matter in another way, some allowance may be made in lieu of interest on its value in respect of the use by the English partner of the German share in the machinery.

This appears to me to follow from the principle that the property of an enemy is not confiscated, though his right to have it back is suspended during war. It was strenuously contended that in the case of a debt to a foreigner bearing interest no interest could accrue during the existence of hostilities between the countries of the debtor and creditor, and in support of this proposition two American cases were cited, *Hoare* v. *Allen* (1) and *Brown* v. *Hiatts* (2), the latter a decision of the Supreme Court of the United States.

These decisions seem to me not to be in conformity with English law. The rule of international law on this point, in the view of the Courts of this country, does not appear to have formed the subject of any express decision in England. The judgment of Lord Ellenborough, however, in *Wolff* v. *Oxholm* (3) appears to me to imply that, in the view of Lord Ellenborough, interest on such a debt would not cease to run during the continuance of the war, but the point does not appear to have been argued. It is difficult to see on what principle the interest is to be forfeited if private property is to be respected.

But in any case, even if these American decisions were right, the consequences contended for by the appellants would not, in my opinion, follow. The question here is not of contract, but of property, and what is equitable as between two partners in respect of the property of the firm. If the English partner uses the machinery which was in part the property of the enemy partner, why should not he in justice make some allowance in respect of this use? The price representing the value of the interest of the machinery has not been paid, and I do not think that it would be in accordance

(1) 2 Dall. 102. (2) 15 Wall. 177.
(3) 6 M. & S. 92.

H. L. (E.) 1918

HUGH STEVENSON AND SONS v. AKTIEN-GESELL-SCHAFT FÜR CARTON-NAGEN-INDUSTRIE.

with law to allow a declaration to stand which would bar all right to share in any profits which may be found to be attributable to the use of the machinery, or some allowance by way of interest on the value of the German partner's share in it.

I agree with the reasons given by the majority of the Court of Appeal, and think that this appeal should be dismissed with costs.

VISCOUNT HALDANE. (1) My Lords, in this appeal the question which arises is whether, upon the dissolution of a contract of partnership between the appellants and the respondents, by reason of the respondents having become on August 4, 1914, alien enemies, the latter can be declared entitled to their share as on an ordinary dissolution, or whether the assets of the partnership should be valued as at the date of the dissolution and the respondents declared entitled neither to subsequently accrued profits, nor to interest as representing such profits, on the footing that the usual rule, as expressed in s. 42 of the Partnership Act, 1890, does not apply. A majority of the Court of Appeal have decided for the former alternative. I agree with that decision, and I have only a few observations to add to the careful judgment delivered by Swinfen Eady L.J. in expressing the reasons for the conclusion come to.

It was contended for the appellants that the effect of war is to exclude an alien enemy from any right to interest payable under a contract in respect of money due to him. I do not think it necessary to express an opinion on this question, which is one that will require consideration if it arises. For I am of opinion that it does not arise here.

In the absence of a special agreement to the contrary, and there is none such in the contract before us, the rule is that on a dissolution of partnership all the property of the partnership shall be converted into money by a sale, and that the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their shares. If there is a special stipulation giving any partner the right to purchase another partner's share, it must, of course, receive effect. Here there is no such special stipulation, and the general principle prima facie applies. Why should the fact that one of the partners is an alien enemy exclude

(1) Read by Lord Sumner.

its operation ? The law of this country does not in general confiscate the property of an enemy. He cannot claim to receive it during war, but his right to his property is not extinguished ; it is merely suspended. Now, in winding up a partnership the procedure belongs to an equitable jurisdiction which, though theoretically concurrent, is practically exclusive. It depends on the principles which Courts of Equity apply to persons who are in possession of property under circumstances in which they are treated as standing in a fiduciary relationship. It is more than and different from the procedure which applies when the rights of parties arise merely out of the rules of the common law which apply to contracts. Partners cannot sue each other excepting for the balance of the account taken in accordance with the principles which Courts of Equity apply in working out the results of dissolution. It makes no difference in the present case that the procedure is, and by reason of the respondents being out of the jurisdiction must be, no more than declaratory under the terms of the statute 5 Geo. 5, c. 36, for facilitating legal proceedings against enemies. The question is what rights of property accrued on the dissolution on August 4, 1914. There is nothing in s. 42 of the Partnership Act which excludes its application in the case of an enemy. To decide in favour of the appellants in this appeal would be to declare them entitled to confiscate the property of the respondents for their own benefit, and I am of opinion that they have no such right.

LORD DUNEDIN. My Lords, I concur.

In order to succeed in obtaining the declaration they ask the appellants must make out that the effect of the war was to operate an immediate transfer of the company's business to them, subject only to a payment by them of the respondents' share of the value of the business and goodwill as at the date of the dissolution of the partnership. I can see no legal ground for such a claim. There is no statute to that effect. The outbreak of war put an end to the partnership. That is admitted on both sides. But the right of the partners was then to have the business realized and the proceeds divided. No doubt realization may be effected by sale in open market, or by sale to one of the partners. But such sales can only be directed in a winding up, and this process is not a winding up.

H. L. (E.)
1918
HUGH STEVENSON AND SONS v. AKTIEN-GESELL-SCHAFT FÜR CARTON-NAGEN-INDUSTRIE.
Lord Dunedin.

The appellants have at their own hand continued the business. The result in law is that they carry on the business as trustees for the partners until the winding up is effected. No doubt the enemy partner cannot receive money during the war. But his property as such is not confiscated. Even if it were it would be confiscated to the King, not to his quondam partner. Nor will he after the war be necessarily entitled to a moiety of the gross profits. He will only get the fruits to which his property is entitled. In other words, the working partner may claim and obtain a large allowance for his work and skill. All that can only be settled in the winding up. It is for the appellants to bring on the winding up as soon as may be, and for that purpose they may, if so advised, invoke the aid of the custodian; if not, they must wait till the end of the war, or till legislation makes service on an enemy a possibility.

The learned judge before whom the case first depended based his view upon the non-applicability of the 42nd section of the Partnership Act to the case of an enemy partner. He held that section inapplicable because ss. 37, 39, and 40, which deal with other aspects of dissolution, require the invocation of the Court, which invocation the enemy partner, having no right standi in judicio, could not set in motion. In my opinion s. 42 is not in any way dependent on ss. 37, 39, and 40, and may stand though they fall. But apart from that, if s. 42 were written out, then all that would happen would be that there was no statutory enactment applicable to the situation, and the result would only be that we should have to invoke the ordinary rules of equity (for the Equity Courts have practically arrogated to themselves the controlling of partnership rights and duties consequent on dissolution), and these rules would lead us to the same result as is statutorily declared by s. 42.

I wish to add that the question raised by the American authorities cited does not seem to me to arise, and I reserve my opinion as to whether those authorities would or would not be held as in accordance with the law of this country.

I agree with the judgment of Swinfen Eady L.J., and think that the appeal should be dismissed.

LORD ATKINSON. My Lords, I concur.

The principles contended for in argument in support of this

appeal would in my view, if sound, entitle every trustee in this country in whom an income-bearing fund was vested whose cestui que trust happened to be an enemy alien, every agent having such an alien for his principal, who was in receipt of the produce of that principal's property, every board of directors of a railway, steamship, or commercial company having an alien enemy amongst its shareholders, to confiscate the income produced by, or the dividend accruing upon, the alien's property or received or receivable during the continuance of the war, on the plea that to hoard or preserve these parts of his property for him till peace was restored would enrich him, and by enriching him benefit his country, and necessarily injure this country, his country's enemy. The prerogative of the Crown, it is said, in early days extended to seizing enemy property on land as well as on sea. This has long since fallen into disuse. The principle I have already referred to would revive it, but transfer it from the King to his Courts. The passage cited by Swinfen Eady L.J. from the judgment of Lord Parker of Waddington in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1) is, in my opinion, directly in point. The appellants' counsel in that case raised the point that the respondent company was an alien enemy company, and that it was therefore a violation of the prohibition against trading with the enemy to pay to them the sum they sued for; and, further, that even if the company had been an English company it would still be against this rule to make any payment to it because, all the corporators and directors being alien enemies, any such payment would be a payment for the benefit of alien enemies. It was in reference to this point with others that Lord Parker made the remarks cited. They go to establish that the preservation for the benefit of an alien enemy of the portions of his property situated in this country with their fruits until the war ends for the purpose of their being then restored to him does not, according to the general law, amount to trading with the enemy; that the prohibition against doing anything for the benefit of the enemy means the doing of it while he is an enemy, and does not contemplate some possible advantage to him when peace comes. My Lords, I entirely concur with the judgment delivered by Lord Parker on this point. If this be so, the respondents would be entitled

(1) [1916] 2 A. C. 307, 311, 347.

H. L. (E.) 1918 HUGH STEVENSON AND SONS v. AKTIEN-GESELL-SCHAFT FÜR CARTON-NAGEN-INDUSTRIE. Lord Atkinson.

to reap the same benefits from the continued trading of the appellants as those which they would have been entitled to reap if this country were at peace with Germany and the partnership had been dissolved for some cause other than war, with this exception, however, that they cannot while the war lasts sue to recover the money which represents those benefits, nor can the appellants legally pay it to them.

I proceed to consider in what relation would the appellants stand to the respondents, apart from statute law, if England and Germany were now at peace, and then to consider how the state of war affects that relation. The relation is a fiduciary relation. If that be so, the authorities show that equity will never permit the person standing in that relation to another to trade with the property of that other for his own gain. He must hold the profits he is making in trust for the owner of the property the use of which produced them. Of course, in estimating the amount of these profits an allowance may well be made for the skill and labour expended by the accounting party in acquiring them.

These authorities have gone very far in holding men liable for the profits made by them in trading with the capital of others.

When a partnership has been dissolved by death or bankruptcy or otherwise it has been decided that the relation existing between the surviving partner and his former partner or the representatives of the deceased partner as well as between his surviving partner and the assignees in bankruptcy of the bankrupt partner is a fiduciary relation. In *Knox* v. *Gye* (1) Lord Hatherley, differing from Lord Westbury, delivered a remarkable judgment, insisting, with what appears to me to be convincing reasoning, that such a fiduciary relation did exist. He says: "It is trite law that a surviving partner cannot make use of the assets of a deceased partner . . . . without being accountable for the use he has made of them. The executors of the deceased partner have a right to a sale of every portion of the partnership property, so completely are they held to be in a fiduciary position, so completely are the assets, including the plant or houses, ... or whatever the description of property may be that comes into the hands of the surviving partner by right of his survivorship at law, and which are all vested in that surviving

(1) (1872) L. R. 5 H. L. 656, 679.

partner by right of his survivorship at law, held to be property in all of which, whether they are chattels of the partnership, or estates of the partnership, the executors of a deceased partner have an interest commensurate with the extent of the share of their testator."

In *Cassels* v. *Stewart* (1) Lord Blackburn, after alluding to *Featherstonhaugh* v. *Fenwick* (2) and other cases of that sort, said: "I do not think that that class of cases has any analogy with the present. Those cases proceed upon the ground that a partner being an agent (for I think it is because he is an agent that the fiduciary character arises), if he, as an agent, makes a profit out of the concerns of his principal, and as acting for him, he must communicate it to his principal; he cannot make a profit out of his principal's business for himself. As I have said, a partner is an agent, and the principle applying to him is a branch of that general rule which applies to agents." In *Vyse* v. *Foster* (3), which was a case where the deceased partner had appointed two of the surviving partners as his executors, Lord Cairns said: "My Lords, it is a well-settled rule of the Court of Chancery that a trustee or an executor who uses trust money in trade must account for the profits which he makes by that use of it . . . . My Lords, with regard to the application of that principle to partnerships, I may mention two very familiar examples, which really will be found to be the cases under which almost, if not quite, all the authorities cited at your Lordships' Bar may be ranged. If a partner in a trading firm dies, and if he constitutes one or more of his co-partners his executors, and if there is nothing special in the contract of copartnership, and if the assets of the testator are not withdrawn from the copartnership, but are left in it, and no liquidation is arrived at, no settlement of accounts come to, it is a trite and familiar rule in the Court of Chancery to hold, that the estate of that testator is, to all intents and purposes, entitled to the benefit of a share of the profits which are made in the trade after his death." It will be observed that Lord Cairns places partners, trustees, and executors on precisely the same footing in respect of their liability to account for the profits realized by employing trust

(1) (1881) 6 App. Cas. 64, 79. (2) (1810) 17 Ves. 298.
(3) L. R. 7 H. L. 318, 329.

H. L. (E.)
1918
HUGH STEVENSON AND SONS v. AKTIEN-GESELL-SCHAFT FÜR CARTON-NAGEN-INDUSTRIE.
Lord Atkinson.

funds or partnership assets in trade. In the present case the articles do not empower the appellants to purchase the share of the defendants at a valuation, nor to take that share for themselves at its value. In the absence of special provisions of that kind no partner can in ordinary times, with a view to dissolution or after dissolution, force another partner against his will to submit to anything of the kind. In *Cassels* v. *Stewart* (1) Lord Selborne said that he would be sorry to see the day when the principle of such a case as *Featherstonhaugh* v. *Fenwick* (2) could be called in question. That was a case where a partnership for a term certain was continued after the expiration of the term without any new articles having been entered into. It consequently became a partnership at will terminable on reasonable notice being given by any one of the partners. Some differences arose between the partners, and two of them (the defendants) proposed to their then co-partner (Featherstonhaugh) that they should take the partnership property at a valuation; or if the latter objected he should take his share off the premises. He refused, and the three continued to carry on the partnership business. Featherstonhaugh, having filed a bill, died, and the suit was revived by his representative. The defendants insisted that by reason of the offer they had made they (even if the partnership had been dissolved, which it was held to have been) were not accountable for the profits earned since then by means of the partnership property, but only for the value of that property at the date of the dissolution.

Sir William Grant, then Master of the Rolls, dealing with this contention, said (3): "The next consideration is, whether the terms, upon which the defendants proposed to adjust the partnership concern, were those, to which the plaintiff was bound to accede. The proposition was, that a value should be set on the partnership stock; and that they should take his proportion of it at that valuation; or that he should take away his share of the property from the premises. My opinion is clearly, that these are not terms to which he was bound to accede. They had no more right to turn him out than he had to turn them out, upon those terms. Their rights were precisely equal; to have the whole concern wound

(1) 6 App. Cas. 64, 73. (2) 17 Ves. 298.
(3) 17 Ves. 309.

up by a sale, and a division of the produce. As therefore they never proposed to him any terms, which he was bound to accept, the consequence is, that continuing to trade with his stock, and at his risk, they came under a liability for whatever profits might be produced by that stock." My Lords, it appears to me, with all respect to Atkin J., that his order offends against the principle thus laid down by Sir William Grant, and treated with so much reverence by Lord Selborne, unless the fact that the respondents being alien enemies deprives them of all the rights they would have had if they were not alien enemies, and justifies the practical confiscation of their property. In my opinion that fact does not justify anything of the kind. It does during war forbid the transmission to them by a British subject of any sum of money that subject may owe them. It also deprives them during the same period of the right to sue in the King's Court to recover money due to them, but the continuance of this prohibition and this deprivation for all time, though they should cease to be alien enemies, is a wholly different thing which not even the most rabid patriotism can justify. No justification for it can be found in the Partnership Act of 1890, for though by the 34th section of that statute a partnership is dissolved by the outbreak of war making a partner an alien enemy, s. 42, dealing with the rights of an outgoing partner after dissolution, makes no distinction whatever between dissolutions brought about by the operation of s. 34 and other dissolutions. In each case the partner who by death or "otherwise" (a word wide enough to cover the case of war) ceases to be a partner, or in case of death his representative, is entitled, in the cases mentioned, at his option to a share of the profits made after dissolution, or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets. These, if this construction of the statute be its true construction as I think it is, are the statutory rights of the partner, enemy alien though he be. The statute says nothing as to the remedies available to him to enforce those rights. These may under other provisions of the law be suspended while and as long as he continues to be an alien enemy, but it appears to me that the error underlying the argument presented in support of this appeal, and indeed underlying the decision of Atkin J. also, is this, that the temporary suspension of the remedy is confounded with the

H. L. (E.) 1918

HUGH STEVENSON AND SONS v. AKTIEN-GESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE.

Lord Atkinson.

permanent loss of the right. The rights belonging to a partner after dissolution were before the passing of this statute very much those it now secures to him. In *Darby* v. *Darby* (1) Kindersley V.-C. states what some of them were in these terms: "What is the clear principle of this Court as to the law of partnership? It is, that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners, according to their respective shares in the capital. That is the general rule; it requires no special stipulation; it is inherent in the very contract of partnership. That the rule applies to all ordinary partnership property is beyond all question, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his own share of it in specie." The same principle is clearly laid down by Lord Eldon in *Crawshay* v. *Collins* (2) and by Sir William Grant in *Featherstonhaugh* v. *Fenwick*. (3)

No authority was cited directly supporting this appeal or laying down the principles contended for in argument.

The case of *Syers* v. *Syers* (4) was, however, apparently relied upon as an authority indirectly supporting the decision of Atkin J. In that case the appellant, who was lessee of the Oxford Music-hall in June, 1869, being in debt borrowed from his brother, the respondent, a sum of 250*l.* and at the same time signed a letter which it was decided created a partnership at will between them in one-eighth share of the profits of the music-hall. It was further decided that this partnership was dissolved by a letter written by the appellant in August, 1872, offering to pay this sum of 250*l.* and interest thereon (treating it as a loan) to such an amount as should on a calculation of one-eighth of the profits be found to be due to the respondent. Lord Cairns, exercising the jurisdiction of the Court in winding up the partnership, and directing and controlling the realization of the assets, and the ascertainment of the shares of the partners, proposed a particular form of decree which was adopted, prefacing his proposal with the following statement: "My

(1) (1856) 3 Drew. 495, 503.
(2) 15 Ves. 218.
(3) 17 Ves. 298.
(4) (1876) 1 App. Cas. 174, 183.

Lords, it is very true, as was said at the Bar, that on dissolving a partnership of this kind the ordinary course would be for the Court to direct a sale of the assets, and, if necessary, a sale of the concern as a going concern, and to give liberty for proposals to be made by either party to purchase it before the judge in chambers. My Lords, those provisions are moulded in every case by the Court to meet the circumstances of the particular case; and it appears to me that, looking at the nature of this business, and looking at the very small interest which was taken in it by the respondent, it would certainly not be desirable in this case to have a sale, or to bring these premises to the hammer for the purpose of ascertaining what sum ought to be given for them. It is a case, therefore, in which, if a decree for a dissolution had been made in the first instance, I apprehend that the Court would have thought it right to authorize the owner of seven-eighths of the concern to lay proposals for a purchase before the judge in chambers. I am about to submit to your Lordships a provision which will, I think, in another way, arrive in substance at the same end." The House had already held that a partnership in profits was a partnership in the assets by which the profits are made. The earlier part of the decree declared, as the order of Atkin J. in this case purports to declare, the rights of the parties in the partnership assets; the second part of the decree in reference to which the above cited remarks were made merely directed how the partnership should be wound up and the assets ascertained and distributed according to the right so declared.

The declaration of the rights of the parties is a strictly judicial proceeding to be made according to strict legal principles. The realisation of the assets and their distribution according to the rights so ascertained and declared is a proceeding of an administrative character in which, of two or more modes of procedure, all legitimate, that one may be chosen which is best suited to the special circumstances of the case. This case is in my view no authority whatever in support of the appeal. Two American cases and one English (*Du Belloix* v. *Lord Waterpark* (1)) were cited going to establish that where the relation between the parties is that of debtor and creditor interest does not accrue to an alien enemy while he is an

(1) 1 Dow. & Ry. 16.

H. L. (E.) 1918

HUGH STEVENSON AND SONS v. AKTIEN-GESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE.

Lord Atkinson.

alien enemy. It is not very easy to ascertain what precisely was the principle upon which those decisions were based. As far as one can gather, however, it appears to me to be this: that interest is in the nature of damages payable by the debtor by reason of his withholding his debt, his default in not paying his debt, and since during war he cannot lawfully pay his debt to an alien enemy without committing a crime, he is not in any default in omitting to pay it, and should not therefore be mulcted in damages for not doing what he cannot do lawfully. This doctrine has been extended to a case where the debt was due under a covenant by a mortgagor to pay interest on the mortgage money, presumably on the ground that, though the covenant was in form absolute and independent of the payment of the mortgage debt, it was impliedly conditional on default being made in payment of that debt. I do not think these decisions are consistent with the principle of the decision in *Wolff* v. *Oxholm* (1), in which, as I read the report, interest which accrued due during the war with Denmark was recovered, and besides I think they have not any application to the present case. This is not a case of mere debtor and creditor. It is a case, to use Lord Blackburn's language, between a principal and an agent who has got possession of his principal's property and traded with it for profit. He is accountable for the profits he has so made, and under the Partnership Act interest on the principal's share of the fund employed in trade is at his option, and only at his option, awarded to him in lieu of his share of those profits. If the principal has a right to the one he has, on his election to take it, an equal right to the other. The principle of awarding interest as damages for withholding a debt has not any application to such a state of things. I concur with the Court of Appeal in thinking that the Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), proceeds upon the assumption that the property of enemy aliens should not be forfeited but preserved for them until the end of the war. I also concur with them in thinking that by vesting the interest of the respondents in the partnership and assets in the custodian under the Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. 5, c. 105), the partnership can practically be wound up.

(1) 6 M. & S. 92, 106.

I am clearly of opinion that the decision appealed from was right and should be upheld, and the appeal be dismissed with costs here and below.

LORD PARMOOR. My Lords, the appellants are an English limited company and the respondents are a German company carrying on business in Dresden. On November 22, 1906, an agreement was entered into between the appellants and respondents consisting partly of agency and partly of partnership. On the outbreak of war on August 4, 1914, the partnership ipso facto terminated. There is a provision in the agreement that on its termination after the lapse of the period agreed upon, or as provided in clause 2 thereof, the party making the highest offer should receive the machinery for the manufacture of clamps in Manchester. This provision has no application in the conditions which have arisen.

In June, 1915, the appellants issued a writ, and on February 8, 1916, an order was made that the partnership constituted by the said contract was dissolved on August 4, 1914, and that the respondents are entitled to the value of their share in the said partnership, including the goodwill (if any), as of the date of August 4, 1914, that clause 12 of the said contract is not applicable, and that the respondents were not entitled to any of the profits of or interest in the capital of the partnership since August 4, 1914. This declaration was varied in the Court of Appeal by eliminating "the date of August 4, 1914," and the words "that the respondents are not entitled to any of the profits of or interest in the capital of the partnership since August 4, 1914." It is against this order that the appeal is brought. The appellants commenced their action under the statute 5 Geo. 5, c. 36, intituled "An Act to facilitate legal proceedings against Enemies in certain cases."

The question raised in the appeal is as to the respective rights of the English and enemy partner companies where the partnership has been dissolved by the outbreak of war. There is no doubt what the respective rights would have been if the partnership had terminated immediately preceding the outbreak of war. In this event, in the absence of any special agreement in the contract, the

H. L. (E.) 1918 — HUGH STEVENSON AND SONS v. AKTIEN-GESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE. — Lord Parmoor.

property belonging to the partnership would have been sold, and the proceeds of the sale, after discharging debts and liabilities, would have been divided among the partners according to their respective share in the capital. By s. 42 of the Partnership Act an outgoing partner is entitled to a share of the profits after a dissolution, or to interest, where the business of the firm is carried on with its capital or assets, without any final settlement of accounts as between the firm and the outgoing partner. There are special difficulties in procedure incident to the relationship between English and enemy partners on the outbreak of war, but it would be contrary to well-established principle to hold that the existence of these difficulties would justify a declaration giving exceptional rights to the English partner, which in effect would authorize him to confiscate property which is not his, and which he controls in a fiduciary capacity. The right of confiscation of enemy property on land in favour of the Crown has long been disused, but it is a startling proposition that the right, so long disused by the Crown, can be claimed for the benefit of a private individual. This would be the creation of a privilege in favour of partners who, before the outbreak of the war, had been in partnership with enemies or enemy firms.

It was argued that under modern conditions of finance some advantage might accrue to the enemy by holding his property in suspension during the continuance of the war, but I concur in the opinion expressed by Lord Parker in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1) that "Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war." It will be for the Legislature to determine the ultimate destination of the property of the enemy partner, and in the meantime the suspension of his rights is no foundation for the claim of the English partner to have the fiduciary relationship terminated for his sole benefit.

Two Acts of emergency legislation have been passed, based on the principle that enemy property on land is not confiscated,

(1) [1916] 2 A. C. 307, 347.

although the right to enjoyment is suspended during the war. The Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), makes provision not only for preventing payment of money to enemies, but for preserving such money and certain other property belonging to enemies, so that arrangements may be made at the conclusion of peace. What these arrangements may be Parliament will determine, but in the meantime no Court can decree the confiscation of enemy property in favour of an English partner. The Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. 5, c. 105), enables the Board of Trade to vest enemy interests in the partnership and assets in a custodian with full powers of selling, managing, or otherwise dealing with the property, thus providing an effectual means to meet the difficulties in procedure which had arisen on the dissolution of a partnership with an enemy partner. In the course of the argument two American cases were called to the attention of your Lordships—*Hoare* v. *Allen* (1) and *Brown* v. *Hiatts*. (2) These cases have not, in my opinion, any direct bearing in this appeal, and I should require further research and investigation before accepting them as an authority that interest is not payable though there is a stipulation for its payment. In such a case it is difficult to see any difference in principle between the payment of interest and the payment of a capital sum. The case of *Du Belloix* v. *Lord Waterpark* (3) illustrates this point. This was an action on a promissory note which did not contain a stipulation for payment of interest. In the absence of such a stipulation the judge directed the jury that interest was damage for the detention of the debt, and that the question whether it should be allowed was peculiarly for their consideration. The jury found a verdict only for the principal sum named in the note. The Court held that the jury had been rightly directed and that the question of interest was entirely for them. In the course of his judgment Abbott C.J. said : " But there is another objection to the plaintiff's recovering interest on the debt, for during the greatest part of that time he was an alien enemy, and could not have recovered even the principal in this country." My Lords, in my opinion this dictum would not apply either to a case in which there is a stipulation

(1) 2 Dall. 102. (2) 15 Wall. 177.
(3) 1 Dow. & Ry. 16, 19.

H. L. (E.) 1918 — HUGH STEVENSON AND SONS v. AKTIEN-GESELLSCHAFT FÜR CARTONNAGEN-INDUSTRIE.

for interest, or where there is a fiduciary relationship between the parties on the dissolution of a partnership.

My Lords, in my opinion the appeal fails.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, January 25, 1918.

Solicitors for appellants: *Burn & Berridge.*
Solicitors for respondents: *Herbert Smith, Goss, King & Gregory.*

[HOUSE OF LORDS.]

H. L. (E.)* 1918 — *Jan.* 25.

ERTEL BIEBER AND COMPANY . . . . . APPELLANTS;

AND

RIO TINTO COMPANY, LIMITED . . . . RESPONDENTS.

DYNAMIT ACTIEN-GESELLSCHAFT (VORMALS ALFRED NOBEL COMPANY) . . . APPELLANTS;

AND

RIO TINTO COMPANY, LIMITED . . . . RESPONDENTS.

VEREINIGTE KOENIGS AND LAURAHUETTE ACTIEN-GESELLSCHAFT FUER BERGBAU AND HUETTENBETRIEB . . APPELLANTS;

AND

RIO TINTO COMPANY, LIMITED . . . . RESPONDENTS.

Trading with Enemy—Contract for Sale of Goods to be delivered by instalments—Outbreak of War during Currency of Contract—Suspensory Clause in Event of War—Public Policy—Suspension or Abrogation.

An English company owning cupreous ore mines in Spain, on various dates prior to the outbreak of the war between Great Britain and Germany, contracted to sell to three German companies large quantities of this ore, to be shipped from Spain to Rotterdam or certain other Continental ports and to be delivered to the several

---

* *Present:* LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

buyers by instalments extending over a number of years. Each of the contracts contained a suspensory clause providing that, if owing to strikes, war, or any other cause over which the sellers had no control, they should be prevented from shipping or delivering the ore, the obligation to ship and deliver should be suspended during the continuance of the impediment and for a reasonable time afterwards, and the clause contained a corresponding provision in favour of the buyers, suspending the obligation to receive in the like event. At the date of the outbreak of the war some of the contracts had been partially executed, the others were wholly executory. The contracts with one of the German companies were in English form; those with the two other companies were made in Germany and were in the German language.

The English company, by actions commenced under the Legal Proceedings against Enemies Act, 1915, claimed declarations that all the contracts were abrogated on August 4, 1914, by the existence of a state of war between Great Britain and Germany:—

Held: (1.) that, apart from the suspensory clause, the contracts were abrogated on the outbreak of war inasmuch as they involved trading with the enemy; (2.) that the suspensory clause, assuming that it applied to a war between the countries of the contracting parties, was void as against public policy as tending to the detriment of this country and the advantage of the enemy country.

Held, further, as regards the German contracts: (1.) that, in the absence of evidence to the contrary, the presumption was that the law of Germany was the same as the law of England; (2.) that, assuming that these contracts were valid by the law of Germany, the question whether they were void as against public policy was to be determined by the law of this country.

Decision of the Court of Appeal affirmed.

APPEALS from three orders of the Court of Appeal affirming judgments of Sankey J.

The several appellants were German companies carrying on business in Germany.

The respondent company was incorporated in England and owned large mines of cupreous sulphur ore in Spain.

These appeals related to contracts entered into before the war for the supply by the respondents of cupreous sulphur ore to the several appellants, and the question for determination was whether such contracts had been entirely abrogated and avoided or whether they were merely suspended during the period of the war.

The facts are fully stated by Lord Dunedin in his judgments in the first and second cases. The third case was admittedly covered by the second and was not argued.

H. L. (E.) 1918

ERTEL BIEBER & CO. v. RIO TINTO COMPANY.
DYNAMIT ACTIEN-GESELLSCHAFT v. SAME.
VEREINIGTE KÖNIGS AND LAURAHÜTTE ACTIEN-GESELLSCHAFT v. SAME.

The following short summary of the facts may be useful to render the arguments intelligible.

In the first case, by an agreement of January 27, 1910, the respondents agreed to sell to the appellants 1,280,000 tons, 15 per cent. more or less in buyers' option, of cupreous sulphur ore to be shipped from Huelva in Spain between February 1, 1911, and November 30, 1914, and to be delivered ex ship in Rotterdam, Hamburg, Stettin, and/or other European Continental ports, except ports in Great Britain, France, Belgium, and Spain and Portugal; and by subsequent agreements the quantity of ore was increased by 105,000 and 50,000 tons. At the outbreak of the war on August 4, 1914, a substantial part of this ore still remained to be delivered.

By a further agreement of October 9, 1913, the respondents agreed to sell to the appellants 2,200,000 tons, 15 per cent. more or less in buyers' option, of cupreous sulphur ore to be shipped from Huelva between February 1, 1915, and November 30, 1919, on the same terms as before.

Each of these contracts contained a suspensory clause, which provided that if owing to strikes, war, or any other cause over which the sellers had no control, they should be prevented from shipping or delivering the ore, the obligation to ship and/or deliver should be suspended during the continuance of the impediment and for a reasonable time afterwards, and the clause contained a corresponding provision in favour of the buyers suspending their obligation to receive in the event of their being prevented from doing so by the like causes.

In the second case the respondents by two agreements dated January 19, 1910, and January 28, 1913, agreed by their agents, the Metallgesellschaft, to sell to the appellants in all some 80,000 or 90,000 tons of ore, representing the requirements of the appellants' works at Schlebusch during the years 1912 to 1918, to be delivered in Rotterdam. These contracts were made in Germany and were in the German language.

Each of the contracts contained a suspensory clause which provided that in all cases of force majeure (which included, among other things, war) preventing the respondents from loading or shipping or delivering the ore, then for the duration of the effects

of such impediment the carrying out of the obligations undertaken by them should be suspended, as also the obligation of the appellants to take delivery so long as they were prevented by causes of force majeure from receiving the ore.

The German agreements differed from the English contracts in matters of detail, but for the purposes of the question at issue (in the view taken by the House of Lords) the only substantial difference between the second case and the first consisted in the fact that the agreements in the second case were in German form.

On August 4, 1916, the respondents, pursuant to orders of Bray J., commenced actions under the Legal Proceedings against Enemies Act, 1915, against the several appellants claiming declarations that the contracts were abrogated and avoided by the existence of a state of war between Great Britain and Germany on August 4, 1914, and that the respondents were thereby released from any obligation to perform them, without prejudice, however, to liabilities then already incurred.

Sankey J. held, on the authority of *Zinc Corporation* v. *Hirsch* (1), that the contracts had become illegal and were dissolved and made the declarations asked for, and his decision was affirmed by the Court of Appeal (Pickford and Scrutton L.JJ. and Neville J.).

1917. Nov. 23, 26, 27, 29. *Compston, K.C.* (with him *August Cohn*), for the several appellants. The question is whether the prohibition against trading and holding intercourse with the enemy extends to contracts as to which it cannot with certainty be predicated that the contracts must, if they are to be performed at all, be performed during the continuance of hostilities. Only those contracts are dissolved which in fact involve trading or intercourse with the enemy, and if the parties have by their contract provided that in the event of war there shall be no communication between them the contract is not determined. That, according to the appellants' construction of the contracts, is what the parties have done here. They have deferred the execution of the contracts until the impediment is removed and for a reasonable time afterwards. *Zinc Corporation* v. *Hirsch* (1), upon which the Courts below have proceeded, is distinguishable in its facts, inasmuch as in this case

(1) [1916] 1 K. B. 541.

H. L. (E.) 1918

ERTEL BIEBER & CO. v. RIO TINTO COMPANY.

DYNAMIT ACTIEN-GESELLSCHAFT v. SAME.

VEREINIGTE KÖNIGS AND LAURAHÜTTE ACTIEN-GESELLSCHAFT v. SAME.

the respondents are under no restrictions as to dealing with the ore during the period of suspension, and has no application, but the decision is too wide. *The Hoop* (1), which contains the first detailed exposition of the law on this subject, dealt with goods seized by capture, and a great deal of Lord Stowell's judgment is not ad rem, but the judgment is founded on the principle that the character of alien enemy carries with it a disability to sue, and that as the parties have no right to compel the performance of their contract they are under a legal inability to contract. *Potts* v. *Bell* (2) was a marine insurance case, and it was held that the insurance money was irrecoverable. Lord Kenyon there said that it was a principle of the common law that trading with the enemy without the King's licence was illegal. That was a case of an executed contract made during the war, and it does not assist in the determination of the present case. *Furtado* v. *Rogers* (3) was again an insurance case and decided that an insurance effected in Great Britain on a French ship prior to the commencement of hostilities between Great Britain and France did not cover a loss by British capture. The decision of Lord Alvanley proceeded on the footing that it was not competent to any subject to enter into a contract to do anything which might be detrimental to the interests of his own country. In other words, the law will not permit a subject to restore to the enemy by insurance what has been taken from them by the rights of war. *Esposito* v. *Bowden* (4) is the first case of the application of these principles to an executory contract. That was a case of a contract for the use of a ship for a single voyage, and the contract was dissolved on the ground that presumably it could not be executed without trading with the enemy; but that reasoning would have no application to a time charter, to which the presumption that it could not be executed without trading with the enemy would not extend. The contracts in question in this case were perfectly legal at the time when they were made, and, although they are rendered nugatory so far as they involve acts which would be illegal during war, there is nothing either in the authorities or in the nature of the case which would justify the rescission of such of their provisions as may be

(1) (1799) 1 C. Rob. 196, 200, 201.
(2) (1800) 8 T. R. 548, 561.
(3) (1802) 3 Bos. & P. 191, 198.
(4) (1857) 7 E. & B. 763.

capable of performance without illegality—*Janson* v. *Driefontein Consolidated Mines* (1)—provided that it is possible to sever the legal from the illegal provisions : *Pickering* v. *Ilfracombe Ry. Co.* (2)

A contract is illegal only so far as it affords assistance to the enemy during the war ; it is no objection to the contract that it may profit the enemy after peace is restored : *Daimler Co.* v. *Continental Tyre and Rubber Co.* (3), per Lord Parker of Waddington. And from the nature of the case it cannot be a present assistance to the enemy that after the war he shall have a supply of material which he cannot use to the detriment of this country. *Tingley* v. *Müller* (4) shows that a contractual relation may exist between an alien enemy and a British subject provided that it involves no intercourse with the enemy. The question of public policy does not enter into this case. That is a question, not for a Court of law, but for the politicians, as is shown by the emergency legislation. The Legal Proceedings against Enemies Act, 1915, prevents the Court from inquiring into any such question, because it deals with the rights of the parties inter se. Nor is there any ground for saying that these contracts have ceased to be operative on the principle that the object of the contract has become commercially impracticable. There is here no evidence from which it can be implied that the adventure will be frustrated : *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (5) ; *Metropolitan Water Board* v. *Dick, Kerr & Co.* (6) [He also referred to *Antoine* v. *Morshead* (7), *Griswold* v. *Waddington* (8), and *Andrew Millar & Co.* v. *Taylor & Co.* (9)]

As to the second case : These contracts tried by every known test are clearly German contracts. The parties have therefore contracted themselves out of the English law, as they may do, and the respondents must prove that this contract is illegal according to German law. Before it can be said that these contracts are contrary to public policy it is necessary to ascertain the public policy of the country to which the parties are subject, and there is no evidence upon that point. The respondents' action is therefore not maintainable :

(1) [1902] A. C. 484, 492, 499, 509.
(2) (1868) L. R. 3 C. P. 235.
(3) [1916] 2 A. C. 307, 347.
(4) [1917] 2 Ch. 144, 157, 160.
(5) [1916] 2 A. C. 397.
(6) Ante, p. 119.
(7) (1815) 6 Taunt. 237.
(8) (1819) 16 Johnson, Sup. Ct. New York, 438.
(9) [1916] 1 K. B. 402.

H. L. (E.) 1918

ERTEL BIEBER & Co. v. RIO TINTO COMPANY.

DYNAMIT ACTIEN-GESELLSCHAFT v. SAME.

VEREINIGTE KÖNIGS AND LAURAHÜTTE ACTIEN-GESELLSCHAFT v. SAME.

Santos v. *Illidge* (1); *Hope* v. *Hope* (2); *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (3); *In re Missouri Steamship Co.* (4)

[Counsel also contended, upon the construction of the arbitration clause in these contracts, that it was a condition precedent to the exercise of the jurisdiction of the Court that there should have been an arbitration: *Scott* v. *Avery* (5); *Caledonian Insurance Co.* v. *Gilmour.* (6)]

[The HOUSE called upon the respondents' counsel in the second case only, upon the question whether the legality of the contracts was to be determined by English or German law.]

Alexander Grant, K.C., and *Micklethwait*, for the respondents. 1. It is no answer to say that these contracts must be construed according to German law. The English Courts will not enforce a German contract which is contrary to the policy of this country, and by the law of this country any contract which involves either intercourse with the enemy or advantage to the enemy is dissolved by the outbreak of war: *Halsey* v. *Lowenfeld.* (7) The respondents are prepared, if necessary, to contend that all executory contracts of a commercial nature are avoided by the war, though not involving communication with the enemy during the war. The existence of a commercial contract between a foreigner and a British subject is incompatible with a state of war existing between the two countries. It is only by the grace of the Crown that an enemy either holds property in the realm or can claim debts due to him. An alien enemy is outside the pale of English law, and, except by the grace of the Sovereign, has no rights within the law. All his civil rights cease. It is enough to say that all commercial contracts which are for the benefit of the enemy are avoided and that these contracts fall within this category.

2. There is no proof that the law of Germany in regard to this is different from the law of this country, and in the absence of proof to the contrary the presumption is that it is the same.

Compston, K.C., in reply, referred to *Godard* v. *Gray.* (8)

The House took time for consideration.

(1) (1860) 8 C. B. (N.S.) 861.
(2) (1857) 8 D. M. & G. 731.
(3) (1884) 12 Q. B. D. 589.
(4) (1889) 42 Ch. D. 321.
(5) (1856) 5 H. L. C. 811.
(6) [1893] A. C. 85.
(7) [1916] 2 K. B. 707, 716.
(8) (1870) L. R. 6 Q. B. 139, 150.

ERTEL BIEBER AND COMPANY *v.* RIO TINTO COMPANY, LIMITED. H. L. (E.)

1918

ERTEL BIEBER & Co. *v.* RIO TINTO COMPANY.

1918. Jan. 25. LORD DUNEDIN. My Lords, the respondents, whom I shall hereafter call the plaintiffs, taking advantage of the provisions of the Legal Proceedings against Enemies Act, 1915, have raised this action to obtain a declaration as against the appellants, whom I shall hereafter call the defendants, that by the existence of a state of war between Great Britain and Germany on August 4, 1914, two contracts of dates January 27, 1910, and October 9, 1913, with indorsements on the first mentioned of March 15 and October 8, 1912, were abrogated and avoided; and that they were relieved from any duties or obligations under the contracts, without prejudice to liabilities already incurred at the aforesaid date of August 4, 1914.

The plaintiffs are an English company owning extensive mines of cupreous ore situate in Spain. The defendants are a German firm who deal in such ore and resell to various customers in Germany. Both contracts were for a very large quantity of ore. The first was for 1,280,000 tons, 15 per cent. more or less in buyers' option, a quantity which by two indorsements was increased to 1,592,750 tons. The ore was to be delivered in approximately equal quantities between February 1 and November 30 in the years 1911 to 1914. It was to be shipped from Huelva in Spain, and delivered ex ship at Rotterdam, Hamburg, Stettin, and/or other European Continental ports except ports in Great Britain, France, Belgium, Spain and Portugal. There were minute arrangements as to quality and price, and various other clauses, to some of which I shall presently advert. The second contract was for 2,200,000 tons, 15 per cent. more or less in buyers' option, to be delivered in equal portions from February 1, 1915, up to November 30, 1919, at same ports as in the first contract. When war broke out between Great Britain and Germany on August 4, 1914, all deliveries had been made under the first contract except about 200,000 to 300,000 tons. Obviously no deliveries had begun under the second contract. No deliveries have been made since the war begun. Sankey J. gave the plaintiffs the declaration they asked, and his judgment was affirmed by the Court of Appeal. Against these orders the present appeal is brought.

My Lords, the proposition of law on which the judgment of the Courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts

H. L. (E.) 1918 ERTEL BIEBER & Co. v. RIO TINTO COMPANY. Lord Dunedin.

which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or any one voluntarily residing in the enemy country. I use the expression "often phrased commercial intercourse" because I think the word "intercourse" is sufficient without the epithet "commercial." As to this I agree with the judgment of the Court of Appeal in the case of *Robson* v. *Premier Oil and Pipe Line Co.* (1), where Pickford L.J., delivering the judgment of the Court, Lord Cozens-Hardy M.R., himself and Warrington L.J., said: "The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction."

That so expressed it is an incontrovertible proposition admits, I think, upon the authorities, of no doubt. There are many cases, but what may be termed the landmarks of the law on the subject will be found in the judgment of Lord Stowell, in Admiralty, in the case of *The Hoop* (2) in the year 1799; in Lord Alvanley's judgment in 1802 in *Furtado* v. *Rogers* (3); and still more explicitly in the judgment of the Queen's Bench in 1857 in *Esposito* v. *Bowden* (4), where the members of the Court were Jervis C.J., Pollock, C.B., Alderson B., and Cresswell, Crowder and Willes JJ. In recent decisions the proposition has been recognized in many cases. I would refer especially to the very learned and careful inquiry into the subject generally by Lord Reading C.J. in the case of *Porter* v. *Freudenberg.* (5) And in your Lordships' House the proposition was at the root of the judgment in the case of *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (6), and was directly applied in the case decided this morning, where the partnership was held dissolved by the war (*Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie* (7)).

(1) [1915] 2 Ch. 124 136.
(2) 1 C. Rob. 196.
(3) 3 Bos. & P. 191.
(4) 7 E. & B. 763.
(5) [1915] 1 K. B. 857, 866.
(6) [1916] 1 A. C. 650.
(7) Ante, p. 239.

The defendants' counsel made an attack, not perhaps on the authority of *Esposito* v. *Bowden* (1), but rather on its application to any contract but a contract of affreightment on a voyage policy; and it was urged that to treat the case as of general application to executory contracts which had such a natural life as might outlive the war was to run counter to a dictum of Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines*. (2) Now *Esposito* v. *Bowden* (1) has been cited by learned judges in many cases, and no doubt has ever been cast on its authority. Nor has it ever been taken as dealing with any particular contract, but it has been held as dealing with contracts in general. So far as *Janson's Case* (2) is concerned, the only matter there decided was that there must be an actual state of war to determine a contract: a mere imminence of war is not enough. It is true that Lord Halsbury's dictum, if applied as an universal proposition, would be counter to the doctrine of *Esposito* v. *Bowden*. (1) But I am satisfied not only that the dictum was obiter and not binding, but that Lord Halsbury was not dealing with or thinking of executory contracts, but of contracts under which rights had already accrued. There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey* v. *Lowenfeld*. (3) In other words, the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some other way against public policy as that has been laid down in decided cases. I shall revert to the cases, but in the meantime I rest with the proposition I have stated above.

Now taking the legal proposition alone, and supposing that the contracts in question had contained no other clauses than those which I have set forth as to dates of delivery, it would at once follow that the first contract, so far as unimplemented, is avoided; for the dates of delivery under it, so far as not performed, extended from

(1) 7 E. & B. 763. (2) [1902] A. C. 484, 493.
(3) [1916] 2 K. B. 707.

H. L. (E.) 1918

ERTEL BIEBER & Co. v. RIO TINTO COMPANY.

Lord Dunedin.

August, 1914, to February, 1915, during which time a state of war has prevailed. It is also obvious that all dates of delivery under the second contract from February 1, 1915, up to the present time have been rendered illegal by the war. The only matter left would be this. The defendants' counsel argued that as it was possible that the war would end before November 30, 1919, there might still be a duty to deliver such instalments as are appropriate to the remanent period from the end of the war to November, 1919. But that would be to turn a contract for two million tons into a contract for far less. To meet this the defendants said that each monthly shipment was essentially a separate contract. The answer is to be found in what was said by Lord Selborne in the case of *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1) That was the case of a contract for 5000 steel blooms with delivery 1000 tons monthly commencing on January next. His Lordship said the subsidiary terms as to time of delivery and as to payment did not split up the contract into as many contracts as there should be deliveries, but there was one contract for purchase of that quantity of iron.

The real defence to the action is to be found in a clause which I have not yet mentioned. There is a clause in practically identical terms in both contracts. I will therefore take that in the later contract. It is clause 15, which is in the following terms: "15. If owing to strikes, war, or any other cause over which the sellers have no control, they should be prevented from shipping the ore from Huelva, or delivering same to the buyers, the obligation to ship and/or deliver shall be suspended during the continuance of such impediment, and for a reasonable time afterwards, to allow the sellers time to resume shipments, and/or deliveries, and if one or more works of buyers' clients should be destroyed or materially damaged by fire, or should war or any other cause, over which the buyers, or their clients, have no control, prevent their receiving such ore, the obligation to receive under this contract shall be reduced in proportion, or suspended during the continuance of such impediment and for a reasonable time afterwards, to allow the buyers time to recommence receipts."

The defendants argue that the effect of this clause is to remove from the contract all necessity for the forbidden thing (intercourse

(1) (1884) 9 App. Cas. 434, 439.

during the war), and that the ratio decidendi of *Esposito* v. *Bowden* (1) is therefore gone, and that there is no reason why the contract to deliver after the war should not be good.

The learned judges of the Courts below have treated this clause by the method of what may be termed confession and avoidance. The clause only purports to suspend deliveries—nothing else. But, say they, there were other duties under the contract besides deliveries. These duties still remain and entail intercourse, so that again the case is brought within the principle of *Esposito* v. *Bowden*. (1) In particular they cite clauses 12, 18, and 19, and they say that the case in respect of these clauses falls directly within the decision of the Court of Appeal which binds them, in the case of *Zinc Corporation* v. *Hirsch*. (2) To which the defendants before your Lordships' House reply that the clauses are not analogous, and, further, that the *Zinc Corporation Case* (2) was ill decided.

My Lords, I do not think it can be gainsaid that, *Esposito* v. *Bowden* (1) being, as I have already said, good law, then, if there are duties which remain unaffected by the suspensory clause, and these duties involve intercourse, the contract must be avoided. In so far as the *Zinc Corporation Case* (2) laid down this proposition it was, in my opinion, right; and it is useless to examine the clauses in that case. It is necessary, however, to examine what the duties are under this contract. In order to make clause 12 intelligible it is necessary first to quote clause 2, which is in these terms: "2. One-fifth of the above 2,200,000 tons, viz., 440,000 tons, 15 per cent. more or less, is to be shipped in each year, during the period between 1st February and 30th November, and spread as nearly as sellers can arrange uniformly over this period. The sizes of cargoes for Rotterdam, Hamburg and Stettin shall be in sellers' discretion, but for other ports sellers shall arrange as far as possible for such reasonably-sized cargoes, but not exceeding 3,000 tons, as buyers desire. About one-half of the ore is to be lumps and about one-half is to be fines, viz., ore which has passed through a half-inch square mesh screen." Clause 12, so far as material, is as follows: "The buyers are to declare in writing not later than 1st January of each year the total quantity of fines and lumps separately which

(1) 7 E. & B. 763. (2) [1916] 1 K. B. 541.

H. L. (E.) 1918

ERTEL BIEBER & Co. v. RIO TINTO COMPANY.

Lord Dunedin.

they desire delivered during that year, and what quantity of each size is to be delivered at each port."

The defendants contend that there is here no duty, but a mere option on their part. If they do not declare, all that ensues is that the ore falls to be divided equally between fines and lumps. I do not agree with the defendants' view. It is not alone the proportion as between fines and lumps but the total quantity that has to be determined, i.e., the decision as to the 15 per cent. more or less. Moreover, evidence has been led, which there is no reason to disbelieve, by which it is shown that from the sellers' point of view it is necessary to have these two matters fixed in order to settle the programme for working the mine during the ensuing year. And this yearly duty seems to me quite independent of delivery. I am therefore prepared to agree with the Court of Appeal on this ground of judgment. As regards clauses 18 and 19, I confess I am doubtful. Clause 18 is an arbitration clause. Now, though I agree with the learned judge who says that arbitration cannot be conducted without intercourse, it seems to me that arbitration is not a necessary, nor indeed a usual, part of the performance at a time when ex hypothesi all deliveries under the contract are suspended. There is nothing for the time being to arbitrate about. So also as regards clause 19. This is a very special matter, providing, in the event of a Mr. Julius Ertel ceasing to be a member of the firm of Ertel Bieber & Co., that his place in the active administration should be filled in a certain way. But Mr. Julius Ertel has not, so far as known, ceased to be a member of the firm, and active administration on the afore-mentioned hypothesis of suspended deliveries is at a standstill.

My Lords, while the construction which I put on clause 12 affords, as I have said, sufficient ground to enable me to say that the judgment of the Court of Appeal should be affirmed, it is, I think, desirable that our judgment should be also based on rather broader grounds. It is the more necessary to express an opinion on this point, because, as I shall hereafter have to say, I think the argument on clause 12 fails to be applicable in the two other cases which your Lordships will presently consider.

My Lords, I confess I cannot read clause 15 without coming to the conclusion that, although war is mentioned eo nomine in that clause, it is not war between Great Britain and Germany, with the legal

consequences thereon ensuing, that is envisaged, but war between other Powers, of whom Great Britain or Germany may be one, and which acts as a practical impediment via facti in stopping the possibility of delivery. But it is not necessary, in my view, to decide this question, for the simple reason that the respondents seem to me to be involved in a dilemma. Either the war which is to suspend delivery does not include a war between Great Britain and Germany, in which case the clause does not apply, or if it does mean such a war, with the legal consequences following thereon, then, in my view, the clause is void as against public policy. I apprehend that in saying this I am not inventing a new head of public policy. I respectfully subscribe to the remarks made on this subject by the Earl of Halsbury in *Janson* v. *Driefontein Consolidated Mines*. (1) I take my view of what is against public policy from what has been said in a series of cases which have certainly become the law of England.

Let me revert to the leading cases which I have already cited. The case of *The Hoop* (2) was a case where the goods from an enemy country, which had been consigned to British subjects and under contract became his property, were confiscated by capture by a British ship. The contract with the enemy subject by which the property in the goods passed was made pendente bello. The ground of judgment was that all trading with the enemy is unlawful at common law as against public policy. Why ? Not because of the terms of the particular contract, but because contract in general might enhance the resources of the enemy or cripple those of the subjects of the King.

The case of *Furtado* v. *Rogers* (3) advanced the application of the rule a step further. Here the contract, which was one of insurance to indemnify for losses by war, was entered into when the countries were at peace. It was held that to allow such a contract, if war meant war between the insurer's country and this country, was unlawful. The ground on which this is put is very important. "We are all of opinion," said Lord Alvanley, "that on the principles of the English law it is not competent to any subject to enter into a contract to do any thing which may be detrimental to the interests

(1) [1902] A. C. 484, 491. (2) 1 C. Rob. 196.
(3) 3 Bos. & P. 191, 198, 199.

H. L. (E.) 1918 — ERTEL BIEBEL & Co. v. RIO TINTO COMPANY. — Lord Dunedin.

of his own country ; and that such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament. It is admitted that if a man contract to do a thing which is afterwards prohibited by Act of Parliament, he is not bound by his contract. This was expressly laid down in *Brewster* v. *Kitchell.* (1) And on the same principle, where hostilities commence between the country of the underwriter and the assured, the former is forbidden to fulfil his contract." He then cites a passage from Bynkershoek's Quaestiones Juris Publici : " Hostium pericula in se suscipere quid est aliud quam eorum commercia maritima promovere," and another from Valin, who, speaking of the conduct of the English during the war of 1756, who at that time permitted these insurances, said : " The consequence was, that one part of that nation restored to us by the effect of insurance, what the other took from us by the rights of war." And then he goes on to deal with another argument in a way which seems to apply directly to some of the arguments used in this case. " But it is said that the action is suspended, and that the indemnity comes so late that it does not strengthen the resources of the enemy during the war. The enemy however is very little injured by captures for which he is sure at some period or other to be repaid by the underwriter."

Then came *Esposito* v. *Bowden* (2), which applied the doctrine to a contract executory and as yet unfulfilled.

From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1.) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2.) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law. I do not quote the recent dicta of learned judges in the cases already cited of *Porter* (3), *Robson* (4), and *Zinc Corporation* (5), because, although they are to the same effect and I agree with them, the recent cases are in one sense submitted in this case to the review of your Lordships' House.

(1) (1697) 1 Salk. 198.
(2) 7 E. & B. 763.
(3) [1915] 1 K. B. 857.
(4) [1915] 2 Ch. 124.
(5) [1916] 1 K. B. 541.

Let me now apply this rule to clause 15 on the hypothesis that it does suspend delivery during the war. But for it the contract would immediately end, by it the contract is kept alive, and that not for the purpose of making good rights already accrued, but for the purpose of securing rights in the future by the maintenance of the commercial relation in the present. It hampers the trade of the British subject, and through him the resources of the kingdom. For he cannot, in view of the certainly impending liability to deliver (for the war cannot last for ever), have a free hand as he otherwise would. He must either keep a certain large stock undisposed of, and thus unavailable for the needs of the kingdom, or, if he sells the whole of the present stock, he cannot sell forward, as he would be able to do if he had not the large demand under the contract impending. It increases the resources of the enemy, for if the enemy knows that he is contractually sure of getting the supply as soon as war is over, that not only allows him to denude himself of present stocks, but it represents a present value which may be realized by means of assignation to neutral countries.

For these reasons I come to the conclusion that clause 15 is void as against public policy and cannot receive effect. Without clause 15 there is an obvious necessity for intercourse, and the contract is therefore avoided as a whole. I am of opinion that the appeal should be dismissed with costs.

LORD ATKINSON. My Lords, the facts have already been fully stated, and it is unnecessary to repeat them.

Sankey J. and the Court of Appeal, following the general lines of the decision in the case of *Zinc Corporation* v. *Hirsch* (1), held that the provisions of the second contract in this case contained in several of its clauses, especially in the 5th, 6th, 8th, 10th, 12th, 18th, and 19th clauses, would involve, and indeed necessitate, frequent communications between the appellants and the respondents on their commercial concerns and dealings, and that, communications of that character between a British subject and an enemy subject being admittedly illegal during the continuance of a state of war between the countries of the respective parties to those communications, the contract of October 9, 1913, was rendered illegal and void

(1) [1916] 1 K. B. 541.

H. L. (E.) 1918 ERTEL BIEBER & Co. v. RIO TINTO COMPANY. Lord Atkinson.

and the respondents were entitled to the relief they claimed. The chairman of the respondent company was examined, and proved that such communications as those above mentioned took place almost daily between the two companies during the currency of their business under the first agreement, and were absolutely necessary for the proper conduct of that business, and that similar communications would be necessary for the carrying out of the second agreement and the conduct of their business under it. I am far from disagreeing with either Sankey J. or the learned Lords Justices as to the grounds on which they respectively based their judgments. I agree with them in thinking that the terms of this second agreement required that, in order to carry out the commercial transaction which was its subject-matter, frequent communications touching its details should necessarily take place between the appellants and respondents, and, if that be so, it is well established by many authorities that those communications would, under the circumstances, be illegal, and would vitiate and make void the contract that involved and required them. It is only necessary to refer to *The Hoop* (1), *Potts* v. *Bell* (2), *Esposito* v. *Bowden* (3), and *Janson* v. *Driefontein Consolidated Mines* (4) as authorities on the point.

The illegality of these communications does not in the slightest degree depend on the triviality of the business details communicated. The danger to the State involved in them lies probably to the greater extent in this, that, if permitted, they would afford easy opportunities for the communication of information most useful to the hostile belligerent State, and therefore injurious to the State of which the person making the communication was a subject. In *Potts* v. *Bell* (5) Sir John Nicholl, in an argument approved of, and indeed apparently adopted, by Lord Kenyon and the Court, put this objection most forcibly. And the recent decisions in the cases of *The Panariellos* (6) and *Robson* v. *Premier Oil and Pipe Line Co.* (7), following the decisions of Sir William Scott in *The Hoop* (1) and in *The Cosmopolite* (8), show that the prohibition, at common law,

(1) 1 C. Rob. 196.
(2) 8 T. R. 548.
(3) 7 E. & B. 763.
(4) [1902] A. C. 484.
(5) 8 T. R. 548, 555.
(6) (1915) 138 L. T. Journ. 484.
(7) [1915] 2 Ch. 124.
(8) (1801) 4 C. Rob. 8.

extended to intercourse of all kinds which could tend to the detriment of this country or the advantage of the enemy.

Owing to some observations which were made in argument, it is, I think, well to point out that the illegality of any transaction as amounting to trading with the enemy does not at all depend upon whether it is profitable, either to the British citizen or to the enemy subject who engages in it, or the contrary. Trading with the subject of an enemy State, or with a person resident in that State, is assumed to be beneficial to the enemy State. It helps the enemy's trade and commerce, and so far defeats one of the objects of this country in going to war, which is to cripple that commerce, in order to force the enemy to come to peace. It may be that the trading would benefit this country as well; that, however, is not for the individual trader to decide. It is for the State to decide, and the State can, if it so desires, grant licences to trade to particular persons or for particular commodities and so secure that benefit. In *Ex parte Baglehole* (1) Lord Eldon said: "Though it might be a very beneficial act in a subject of this country to purchase corn in France and send it to this country at the present period, yet, if he was there without licence to trade, to reside and trade, such commerce would be clearly illegal." The statement was, I presume, based on this ground, that, though beneficial to this country, it would also, presumably, be beneficial to the then enemy, France, and, because of this, necessarily detrimental to the higher interests of England. Lord Alvanley, in the well-known passage of his judgment in *Furtado* v. *Rogers* (2), lays it down "that on the principles of the English law it is not competent for any subject to enter into a contract to do any thing which may be detrimental to the interest of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament." Lord Alvanley was no doubt in that case dealing with the case of a policy of insurance, but he laid down this principle in general terms, and his decision was approved of without qualification in *Janson* v. *Driefontein Consolidated Mines*. (3) Lord Alvanley further says: "But it is said that the action" (i.e., the action to recover on the policy) "is suspended, and that the indemnity comes so late that it does not strengthen the

(1) (1812) 18 Ves. 525, 529. (2) 3 Bos. & P. 191, 198, 199.
(3) [1902] A. C. 484, 506.

H. L. (E.) 1918

ERTEL BIEBER & Co. v. RIO TINTO COMPANY.

Lord Atkinson

resources of the enemy during the war. The enemy however is very little injured by captures for which he is sure at some period or other to be repaid by the underwriter." This remark applies to the suspensory clause in the special agreement.

I think, however, that in this case a wider and equally important question arises for determination. Scrutton L.J. refers, at some length, to it in his judgment. It is this, whether the outbreak of the war does not by itself make illegal the contract contained in the 15th clause of the second agreement. That clause provides that if the respondents should be prevented, owing to strikes, war, or any other cause over which they have no control, from shipping from Huelva, or delivering to the appellants the ore purchased, the obligation of the respondents to ship and deliver the same during the continuance of the impediment and for a reasonable time thereafter to allow the respondents to resume shipments and deliveries should be suspended. There is a corresponding provision that should war or any other cause over which the appellants or their clients have no control prevent them from receiving the ore, the obligation to receive under the contract should be reduced in proportion or suspended during the continuance of the impediment and a reasonable time thereafter to allow the appellants time to recommence receipts. It will be observed that this clause only deals with the shipment, delivery, and receipt of the ore, and save so far as the suspension of those things may affect the other clauses of the contract leaves those latter untouched. Many of the obligations these clauses impose still rest upon the parties, and it is because of this result that I concur in the conclusion at which the Court of Appeal have arrived. As regards this 15th clause, it is necessary in the first place to ascertain what is its precise meaning. Do the words "war or any other cause over which the sellers have no control" cover and embrace the present war between Great Britain and Germany? If they do not embrace it the agreement is clearly illegal and void, inasmuch as it would bind a British subject to deliver goods to an alien enemy irrespective of the existence of that war just as if the two countries were at peace. In my view the clause clearly covers the existing war between this country and Germany though it is not confined to it. Next, does the prevention by war mean not only prevention by physical warlike operations, such

as capture and blockade, for instance, but also prevention by the legal principles applicable to trading during a state of war—the prohibition of English subjects from engaging in commercial intercourse with alien enemies? I see no reason whatever for confining these words to the first of the results of a state of war. I think they include both results. Next, what is the meaning of the words "the obligation to deliver shall be suspended"? Do they mean that the entire amount of ore contracted to be delivered, 2,200,000 tons, 15 per cent. more or less, are to be delivered as soon as the war shall have ended or within a reasonable time thereafter, or do they mean that the respondents are relieved for ever from the obligation to deliver each year while the war lasts the 440,000 appropriate to that year, so that at the end of the war they shall only be obliged to deliver the latter amount for every year between the termination of the war and November 30, 1919? If the first, the agreement purports to secure, as far as an agreement of the kind with a company whose solvency has not been impeached can secure, great and immediate benefits to the appellants, and through them for their country. It will have secured for them the certainty that their trade and commerce with the respondents will be resumed immediately on the termination of the war, that a vast stock of ore will then or within a reasonable time thereafter be available for them, ready for delivery to them or their order, enabling them during the war to make forward contracts with their own customers, and to raise money on the security of this agreement, and thus to keep alive to a considerable extent during the war their trade and commerce to their own gain, with the resulting benefit to their country, and at the same time work to the detriment of England in that it would prevent this vast mass of ore being made available for English manufacture. Well, if it mean the second, benefits the same in kind, though less in degree, would be secured to the appellants and their country, and the same injury in kind, though less in degree, inflicted on the respondents and their country. If this clause 15 were deleted from the agreement it could not, I think, be contended for a moment that the contract was not illegal and void. I cannot think that a clause which does not deprive the appellants of the full enjoyment of all benefits of the contract, but merely postpones that enjoyment for an uncertain time leaving it ultimately certain and

H. L. (E.) 1918

ERTEL BIEBER & CO. v. RIO TINTO COMPANY.

secure, can change the nature of the contract and make it legal and binding. On this ground, therefore, as well as that I have first dealt with, I think this agreement has by the outbreak of the war with this country and Germany become illegal and void, that the decision of the Court of Appeal was right and should be upheld, and this appeal be dismissed with costs.

LORD PARKER OF WADDINGTON. (1) My Lords, I agree.

The appeal before your Lordships arises in an action instituted by the respondents under the provisions of the Legal Proceedings against Enemies Act, 1915, the writ being indorsed with a claim for a declaration as to the effect of the present war on the rights and liabilities of the parties to two contracts entered into by the respondents before the war with the appellants, who, on the outbreak of the war, became enemies of the Crown.

In order to determine the effect of the war upon the rights and liabilities of the parties to a contract it is obviously necessary to examine the contract itself and to determine what rights and liabilities it creates. It is not disputed that the interpretation of both contracts and the rights and liabilities of the parties thereunder are governed by English law. I will in the first instance deal with the contract of January 27, 1910.

The contract of January 27, 1910, as amended by its two indorsements, provides for the sale by the respondents to the appellants of between 1,650,250 tons and 1,219,750 tons of cupreous sulphur ore to be shipped by the respondents from Spain to, and delivered to the appellants at, Rotterdam, Hamburg, Stettin, or other Continental ports named by the appellants during the years 1911, 1912, 1913, and 1914. Some part of the ore contracted to be sold remained undelivered at the commencement of the war. The 12th clause of the contract provides that if, owing to strikes, war, or any other cause over which the respondents have no control, the respondents are prevented from shipping or exporting the ore from Spain or delivering it to the appellants, the obligation to ship or deliver is to be suspended during the continuance of such impediment, and for a reasonable time afterwards to allow the respondents time to recommence shipments, and similarly, if war or any other cause over which

(1) Read by Lord Sumner.

the appellants have no control prevents the appellants receiving the ore, the obligation to receive it is to be suspended during the continuance of said impediment and for a reasonable time afterwards to allow the appellants time to recommence receipts.

It seems reasonably clear that the effect of the clause is not to diminish the quantity of ore to be delivered under the contract, but merely to postpone deliveries until after the impediment in question is removed. Indeed, the contrary was not suggested in argument on either side. The important point of construction is whether the expression "war" as used in the clause covers war between the United Kingdom and Germany, its effect being to postpone deliveries under the contract during and for a reasonable time after the present war, leaving the respondents under an obligation to complete the deliveries contemplated by the contract as soon as possible after the conclusion of peace.

My Lords, it appears to me that the clause is contemplating war as a physical impediment to the performance of what would otherwise be possible and lawful, and not as so changing the status of the parties as to render the performance of any part of the contract in fact illegal. Further, if the clause be construed as covering or providing against the effects of a war between this country and Germany, it is, in my opinion, void as contravening a well-known rule of public policy. It is not permissible by English law for a subject of the Crown to contract with a foreigner that in case of war between this country and the State of which the foreigner is a subject, the latter shall be indemnified against or be relieved from or receive compensation for a loss which he would otherwise suffer by reason of the war or of anything done in the prosecution of the war. This is the principle which underlies Lord Alvanley's judgment in *Furtado* v. *Rogers*. (1) It is true that in that case the actual decision turned on the true construction of the contract, which was for insurance against capture at sea. It was held that such a contract impliedly excluded capture by His Majesty's naval forces. But the really important point is the reason for this conclusion. It was because otherwise the contract would have been altogether void as against the public policy of the realm. In *Janson* v. *Driefontein Consolidated Mines* (2) the same principle is recognized, though the

(1) 3 Bos. & P. 191. (2) [1902] A. C. 484.

H. L. (E.) 1918

ERTEL BIEBER & CO. v. RIO TINTO COMPANY.

Lord Parker of Waddington.

decision itself turned on different considerations. An attempt was there made to extend the principle to a seizure of goods of the insured by his own Government during peace but at a time when war was anticipated, but this attempt failed.

It is to be remembered that the question whether the 12th clause of the contract was or was not void ab initio, as against public policy is not the same as the question how the war itself affected the rights and liabilities of the parties to the contract. The two questions are quite distinct, though they were somewhat confused in the course of the argument. The latter question could only arise on the actual outbreak of war between this country and Germany; the former question might arise even if no such a war occurred. The 12th clause would clearly be applicable if the present war had been between Germany and France only, but if, according to its true construction, it covered war between Germany and this country, it could only be enforced to the extent to which what was legal in it could be severed according to well-known principles from what was illegal, and such a severance might be held to be impossible.

My Lords, it follows from what I have said above that in considering the rights and liabilities of the parties when the war broke out the 12th clause of the contract must be ignored either because according to its true interpretation it does not apply at all, or because if it does apply it is invalid on grounds of public policy. The respondents were therefore at the commencement of the war liable to ship and deliver to the appellants during the year 1914 the undelivered portion of the ore contracted to be sold. The effect of the war on this liability was clearly to abrogate it altogether. It could not be performed without trading with the enemy. The war made it illegal. The case of *Esposito* v. *Bowden* (1) is clearly in point and the decision appealed from is right.

Passing to the second contract, which is dated October 9, 1913, your Lordships will find that it also was a contract for the sale of a large quantity of cupreous sulphur ore. The ore was to be shipped by the respondents from Spain and to be delivered to the appellants at Rotterdam, Hamburg, Stettin, or other Continental ports to be nominated by the appellants during the years 1915, 1916, 1917, 1918, and 1919. The contract contains a clause, namely clause 15,

(1) 7 E. & B. 763.

for all practical purposes identical with the 12th clause of the earlier contract. In determining the rights and liabilities of the parties to the contract when the war broke out this clause must be ignored either because according to its true interpretation it does not cover the present war, or because if it does cover the present war, it is void on grounds of public policy. So far as deliveries under the contract fall to be made during the war, the liability of the respondents to make such deliveries is abrogated by the war on the principle of *Esposito* v. *Bowden*. (1) The only remaining question is as to the liability of the respondents in respect of the deliveries, if any, which, according to the contract, fall to be made after the war is over. In my opinion the liability of the respondents in respect of these deliveries, if any, is also gone. It would be contrary to your Lordships' decisions in *Horlock* v. *Beal* (2) and the recent case of *Metropolitan Water Board* v. *Dick, Kerr & Co.* (3) to saddle the respondents with a contingent liability to deliver ore the quantity of which must during the war remain uncertain when their real contract was for delivery of a large and definite quantity of ore at fixed dates for the delivery of which they could prepare beforehand and at a price presumably fixed with reference to the quantity to be ultimately delivered. It may be that a contract for the sale of goods to be delivered at a future date is abrogated by a war which begins and is brought to a conclusion between the date of the contract and the date fixed for delivery, but I prefer not to express an opinion upon this on the present occasion.

My Lords, in the Court below the learned Lords Justices based their decision on somewhat narrower grounds. They assumed the applicability of the suspensory clauses in the contracts to the present war and their validity in law. But in their opinion the contracts contained other clauses which involved communication with the enemy during the war, and they held that, having regard to these clauses, the effect of the war was to abrogate the contracts altogether. In the view I take of the suspensory clauses it is unnecessary to consider this point. I prefer to rest my opinion on the broader ground that the suspensory clauses cannot, for the reasons I have given, apply to the present war, and upon the consequences which

(1) 7 E. & B. 763. (2) [1916] 1 A. C. 486.
(3) Ante, p. 119.

H. L. (E.) 1918

ERTEL BIEBER & Co. v. RIO TINTO COMPANY.

Lord Parker of Waddington.

necessarily follow, if they do not apply. Your Lordships were invited by Mr. Grant to go still further. He maintained that the war abrogated every executory contract with an enemy, or, at any rate, every executory contract of a commercial nature, whether or not it involved trading with the enemy during the war. He argued, alternatively, that any contract which in the opinion of the Court was beneficial to the enemy was abrogated by the war. It appears to me inadvisable to consider these points unless or until they arise in some concrete form.

My Lords, I may perhaps add this. Some stress was laid in argument on certain passages of my judgment in the case of *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1) I entirely fail to see what bearing these passages have on any question which your Lordships have now to decide. They dealt with certain suggestions made in argument to the effect that certain specified acts, otherwise lawful, might during the war be rendered unlawful merely because of their tendency to enrich the enemy when the war was over. They certainly did not go to any question of public policy or to any question as to the effect of war on contracts between a British subject and a person who became an enemy on the outbreak of hostilities.

My Lords, in my opinion the appeal fails and should be dismissed with costs.

LORD SUMNER. My Lords, there are two contracts, to which this appeal refers. Under the first, as enlarged by two indorsements, the last shipment was to be made by November 30, 1914. This contract was in course of execution when the present war began, and a substantial quantity still remains undelivered. Under the second deliveries were not to begin till February 1, 1915, and nothing has been done under it. Clause 21 provided that "all former contracts are to be considered as expired on March 1, 1915." Accordingly I do not propose to distinguish the first contract from what I have to say about the second. The appellants have raised two contentions, both of which are, I think, of the essence of their argument: (1.) that the effect of the outbreak of war depends on the particular terms of the contract in question, and not upon the

(1) [1916] 2 A. C. 307, 347.

general character of the class of contracts to which it belongs; and (2.) that the outbreak of war discharges further performance only where those terms necessarily involve commercial intercourse with the enemy. If the first proposition is not true, the particular terms of the contract are immaterial. If the second should be read "involves naturally or ordinarily" instead of "necessarily," then on the mere construction of this contract I think the argument fails. Even if clause 15 has full effect as a suspension, still it only suspends the sellers' obligation to ship and deliver, and does not cancel it. Clause 12 is left unaffected throughout, and under it declarations in writing would naturally be given by the buyers as soon as the end of the suspension drew near, even if there were not an annual obligation on them to do so, which I believe to be the better construction.

The rule of law which forbids a British subject to trade with the King's enemies is very ancient. Its effect upon trading contracts which, like the present, are executory on both sides was already well settled by the middle of the last century. *Esposito* v. *Bowden* (1) finally answered the last of the questions which had been raised down to that time. The Court of Queen's Bench held that the charter was only dissolved on the outbreak of war if it could not possibly be performed without trading with the enemy, and in supporting this decision in the Court of Exchequer Chamber Mr. Manisty argued that the mere declaration of war did not rescind the executory contract in question; "it only suspends it, and renders it illegal where it cannot be performed in any legal manner." The Court of Exchequer Chamber first of all made it plain that the question was a general one, not dependent on the mere possibilities of the particular case, and that the occlusion of Odessa to Englishmen generally, by force of law, for an indefinite and presumably protracted time, could not be done away with by suggesting some possibility of a British ship loading cargo in that enemy port while somehow or other avoiding all contact with any enemy. Secondly, the Court decided in express terms that illegality does not suspend; it dissolves. What the law forbids is impossible of performance to those who owe obedience to that law, and this higher public obligation discharges any private obligation to the contrary.

(1) 7 E. & B. 763; 27 L. J. (Q.B.) 17, 19.

H. L. (E.) 1918

ERIEL BIEBER & Co. v. RIO TINTO COMPANY.

Lord Sumner.

Before 1914 I do not think that the theory upon which this dissolution is held to occur had been the subject of actual decision. The common law rule is much older than the development of overseas commerce, and during last century the practical question raised was "how does the rule affect commercial contracts," and not "how is that effect to be stated and justified in terms of general jurisprudence." It occurred, however, within recent years to some ingenious mind, obviously with the desire to prefer private commerce to public principle, that a clause of suspension might secure to particular contracts that continued existence during war which the Exchequer Chamber had denied generally. To negotiate with an enemy towards the end of a war for the conclusion of a contract to sell and deliver goods as soon as peace should be signed would be a crime, but to stand bound to do so by a contractual tie throughout the war might possibly be lawful, if only the contract was concluded before the war with a provident eye to the possibility of its occurrence. Hence the disputes of which the present appeal is a type. Does a suspensory clause oust the application of the general rule?

My Lords, public policy, though a clue to the principle involved, is not in itself the key to the difficulty. The rule as to the dissolution of trading contracts on the outbreak of war, when they are executory on both sides, is said to exist for the purpose of assisting to cripple the enemy's commerce and of closing an avenue to illicit and traitorous correspondence. These are, however, the practical advantages of the rule, not its basis in theory. Courts of law are not at liberty to apply the rule and dissolve a contract merely because they think its continuance disadvantageous to this country's belligerent policy. I think that public policy is a separate ground for deciding this particular case, but so far as trading with the enemy goes I wish to keep within what I conceive to be implicit in the old decisions upon the question.

My Lords, if upon public grounds on the outbreak of war the law interferes with private executory contracts by dissolving them, how can it be open to a subject for his private advantage to withdraw his contract from the operation of the law and to claim to do what the law rejects, merely to suspend where the law dissolves? The prohibition, which arises at common law on the outbreak of war, has for this purpose the effect of a statute. The choice between

suspending and discharging the contract on the outbreak of war was quite deliberately made, and if occasionally the contract is said to be only suspended, or a Court refuses to dispose of a case on the ground of dissolution alone, this only brings into relief the fact that by an overwhelming preponderance of authority such trading contracts have been held to be dissolved on the outbreak of war. An appearance of authority to the contrary is sometimes found to be in truth a misreading of the language of a decision. Thus Lord Halsbury's use of the word " affected " in *Janson* v. *Driefontein Consolidated Mines* (1) is due to the fact that, by consent, the case had been tried as if the then war had terminated. The question was one of a cause of action, which had accrued one day before the outbreak of war and thereupon had been suspended as to the remedy only. Of course, if the war was treated as over, neither contract nor remedy was " affected." The policy was not an executory contract after war broke out so far as concerned the gold seized at Vereeniging at all. There can be no doubt that the matter must have been considered. To many people suspension seems to have much to recommend it. Freedom of contract is challenged less; the sacrosanctity of commerce is respected more. The Courts could not have adopted the rule of dissolution unless they had reasoned that suspension would be inconsistent with this principle of the law of contract. I will quote the language of Willes J. in *Esposito's Case* (2): " In all ordinary cases, the more convenient course for both parties seems to be that both should be at once absolved, so that each, on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage or the shipment presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other opportunity of lawfully performing the contract perchance arising. The law upon this subject was doubtless made, according to the well-known rule, to meet cases of ordinary occurrence." To his mind I think it is clear that the rule was one made to provide certainty at the outbreak of war, where in itself everything is uncertain; that it was one made to apply generally,

(1) [1902] A. C. 484, 493.
(2) 7 E. & B. 763, 792; 27 L. J. (Q.B.) 17, 25.

H. L. (E.) 1918 ERTEL BIEBER & CO. v. RIO TINTO COMPANY. Lord Sumner.

although taking its form from the needs of ordinary cases; and that, for the purpose of applying it, the case must be looked at as things stood when war broke out, and not as they were ascertained to be or as they ultimately happened during the interval before the trial of the action.

In the abstract, discharge of a contract by reason of the outbreak of war between the countries to which the parties respectively belong should be effected simply by operation of law independently of their arrangements. The rule sets the public welfare above private bargain. It does so for the safety of the State in the twofold aspect of enhancing the nation's resources and crippling those of the enemy. To hold that the parties may be allowed to make their own arrangements for attaining these ends and to set their private judgment, not untinged by considerations of their future interest, above the prescriptions of the public law would be anomalous. To say that for the purpose of preventing such intercourse the law generally determines stipulations which involve commercial intercourse between enemies, but when the parties have agreed not to hold any such intercourse is content to leave it to them, would indeed be rash. True, there is the criminal law against holding commercial intercourse with the enemy, but the offence is one not always easy to detect. In a matter of national safety the State cannot surely rely on the bare integrity and good faith of persons whose commercial interest may so strongly conflict with their public duty.

Though the contracts now in question are elaborate in form and grandiose in scale, they are not in their nature distinguishable from such a contract as that in *Esposito* v. *Bowden*. (1) The latter was a charter; the former are contracts to sell goods and deliver them overseas under many charters. "It is nowise important," says Story J. in *The Rapid* (2), "whether the property engaged in the inimical communication be bought or sold, or merely transported and shipped." Nor is it material that these contracts provide for a series of shipments and for deliveries by instalments. Chancellor Kent puts the very case of a contract to ship in instalments in *Griswold* v. *Waddington* (3), and dismisses it as indistinguishable

(1) 7 E. & B. 763; 27 L. J. (Q.B.) 17.

(2) (1812) 1 Gall. 295, 309.

(3) (1819) 16 Johnson, Sup. Ct. New York, 438, 489.

from a contract for a single shipment. It is not for this purpose that each instalment can be treated as if it were the subject of a separate contract, or that instalments, which in point of date might fall to be delivered after the conclusion of peace, can be severed from the rest. The whole contract so far as it is mutually executory is dissolved. Again, the suspension of the right of suit in the case of enemy nationals, for causes of action already accrued, until the conclusion of peace is not an argument in favour of substituting suspension by agreement for discharge by operation of law. Whether it sounds in debt or in damages such a cause of action implies a present obligation to pay simultaneous with its coming into existence. Suspension of the remedy implies no continuance of the contract during the war, but only a recognition of its existence before the war as the basis or origin of a right, which, when it has accrued, is a chose in action, a form of property.

My Lords, in my opinion discharge by operation of law upon the outbreak of war operates upon trading contracts as a class by reason of their common characteristic of international intercourse, and is not prevented by special stipulations between the parties. It is not necessary for present purposes to define the term "trading" or the word "enemy." The class affected is not such contracts as contemplate a continuance of trading during war, but trading contracts as such, which are in being as mutually executory contracts at the outbreak of war, and would in ordinary course and circumstances import commercial intercourse. "War," says Lord Lindley in *Janson's Case* (1), ". . . . prohibits all trading with the enemy except with the Royal licence, and dissolves all contracts which involve such trading." As the present case is one of such executory trading, I think the rule that such contracts are discharged upon the outbreak of war must apply.

There is another and independent ground on which this appeal may be disposed of. "We are all of opinion," says Lord Alvanley C.J. in *Furtado* v. *Rogers* (2), speaking of a commercial contract operating after the outbreak of war though made before it, "that on the principles of the English law it is not competent to any

(1) [1902] A. C. 509. (2) 3 Bos. & P. 191, 198.

H. L. (E.) 1918

ERTEL BIEBER & CO. v. RIO TINTO COMPANY.

Lord Sumner.

subject to enter into a contract to do any thing which may be detrimental to the interests of his own country." If the principle of this decision be applied to the construction of these contracts, the suspensory clauses must be read as if they contained the words "an Anglo-German war always excepted"; in that case, under *Esposito* v. *Bowden* (1), the contracts became discharged. If on the other hand the above passage be applied and the suspensory clauses be read as the appellants contend, then in my opinion the contracts never were valid. They were void from the outset on grounds of public policy. It is incidental to the conduct of war that the Sovereign should be free to bring pressure to bear on the enemy by crippling his commerce and exhausting his resources; it is incidental to the conduct of war that the resources of the Sovereign's subjects should be free to be employed lawfully in preserving and extending the resources of the realm. It is further important to its conduct that there should be no clog on the Sovereign's power to impose his will on the enemy through fear of the inclusion of unfavourable economic conditions in any treaty of peace. The present contract involves large sums. Your Lordships were told that its future performance represents 10,000,000*l.* to the buyers, and it well may be so. Multiply these contracts, say, a hundredfold—no extravagant hypothesis—and what is the result on the conduct of the war? If these suspensory clauses are valid, the enemy knows three things: the first, that he may expend certain of his material resources without stint, for his right to replenish them in enormous quantities is assured at or shortly after the conclusion of peace; the second, that the present employment of these raw materials as British resources during the war, whether in the way of commerce or in the actual supply of combatant needs, is hampered by the existence of huge future commitments, performable at an uncertain and perhaps not distant date; the third, that he may rest assured that the imposition of commercial disadvantages in the treaty of peace is pro tanto neutralized, and that military resistance may be prolonged in proportion. I think it plain, as it was thought by the Courts below, that such suspensive clauses as are in question here tend to defeat the successful conduct of the war on His Majesty's part, and are therefore contrary to public policy and render the contracts void.

(1) 7 E. & B. 763; 27 L. J. (Q.B.) 17.

My Lords, I do not forget how limited is the extent to which Courts of law can guide their decisions by their views of public policy, nor am I insensible to the fact that in given circumstances, perhaps in circumstances as they are now, more profits may be lost by British than by enemy subjects, if all mutually executory trading contracts are discharged on the outbreak of war. How this may be, in my opinion a Court of law is not competent to inquire or decide. Is it to be guided by the sums involved, the profits in prospect, or the economic value of the particular commodity to the general commerce and industry of the nation? Is it to call upon private parties to give evidence of the existence of contracts (probably jealously concealed) to which others are parties and they are strangers? It is for the Executive to investigate and for the Legislature to provide for such possibilities. All that judges can do is to adhere to established rules, to ascertain their logical foundations, and to apply them impartially to disputed cases.

There remains a question as to the effect of the Legal Proceedings against Enemies Act, 1915. The respondents were British subjects, not under any disability, and therefore competent suitors for a declaration under that Act. The question is how their contractual obligations were affected by the outbreak of war. Let the appellants' case be put at its highest. Suppose, for example, that the contract provided in terms for the continuance of the respondents' obligations, let English law be what it may; such might be the effect, if the contracts were German contracts and the appellants proved that German law was the opposite of English law in this matter. Suppose, again, that the contract provided in terms that no English Court should pass upon it, which, even if the arbitration clause were governed by *Scott* v. *Avery* (1), as it is not, would be as favourable to the appellants as could be. What then? These provisions would still be but parts of a mutually executory trading contract between British subjects and His Majesty's enemies, and, if the view I have submitted to your Lordships is right, the contract, clauses and all, came to an end on the outbreak of war. If so, neither these clauses nor any like them could be prayed in aid as answers to the claim, which the respondents were entitled to make.

(1) 5 H. L. C. 811.

H. L. (E.) 1918

ERTEL BIEBER & CO. v. RIO TINTO COMPANY.

DYNAMIT ACTIEN GESELLSCHAFT v. SAME.

The declaration adjudged to them was in my opinion right, and the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, January 25, 1918.

DYNAMIT ACTIEN-GESELLSCHAFT (VORMALS ALFRED NOBEL AND COMPANY) *v.* RIO TINTO COMPANY, LIMITED.

1918. Jan. 25. LORD DUNEDIN. My Lords, the contract in this case is in its main features the same as those in the case which your Lordships have just considered. The same relief is asked. There is therefore no need to repeat what has already been said in that case. This case would be directly ruled by the other were it not for one distinction. The contract in *Ertel Bieber's Case* was an English contract. The contract in this case was a contract made in Germany in the German language by a German agent of the English principal.

This distinction is sought to be utilized by the defendants in various ways which I will deal with separately.

In the first place it is pointed out that there is an arbitration clause which provides that all disputes arising from the interpretation of the contract are to be settled by arbitration, and the fact that, in default of agreement as to an umpire, application is to be made to the Chamber of Commerce at Frankfort-on-the-Main is said to point to a German arbitration. From this the defendants argue that the plaintiffs cannot bring themselves within the words of the Legal Proceedings against Enemies Act, 1915, which gives its privilege only to a British subject entitled for the time being to bring an action in the High Court. On this point I entirely agree with the simple view expressed by Neville J., and have nothing to add to what he has said.

Next, it is said that the contract being a German contract interpretation must be according to German law, and that it is accordingly necessary for the plaintiffs to show that, interpreted according to German law, there are clauses which involve intercourse with the enemy and avoid the contract, the suspensory clauses not interfering with those clauses.

My Lords, it is here that I find the judgment of the Court of Appeal, though I thoroughly agree with much of what is said by the learned judges, not quite satisfactory to my mind. My reason is this : I do not find in this contract any exact counterpart to clause 12 in the Ertel Bieber contract. Clause 5 is appealed to, which is in these terms : " 5. Delivery calls : You are to give us notice at once for the year 1913, and for each of the following contract years at latest on the 30th September of the year previous to delivery of any special wishes regarding the deliveries of the quantities of sulphur ore which you are to take under this contract."

This, in my view, does not impose a duty, but merely gives an option. I need not, however, pursue the subject, as the ground on which the judgment in the *Ertel Bieber Case* was based, that a clause suspending deliveries during the war, but making them obligatory afterwards, is against public policy, and therefore void, is equally applicable to the clause in this case. The only point, therefore, is whether the fact of this being a German contract to be interpreted according to German law prevents the application of this ground of judgment.

My Lords, it seems to me that the fact of its being a German contract has no bearing on the question. I will assume that questions of interpretation are to be settled in accordance with German law. This is, perhaps, an arguable point, seeing that much of the performance, e.g., the mining of the ore, the provision of the tonnage, &c., is not to be performed in Germany. But I will assume it. Now what could the German Courts decide ? If the contract continued to be carried out according to its terms there would necessarily be commercial intercourse. But the German Courts could decide that the suspensory clause stopped such intercourse, and either did or did not leave other duties involving intercourse. If they decided that it did leave such duties, then again there would be intercourse. If they decided it did not, then they might decide that the existence of the suspensory clause and the continuance of the contract after the war were not against German public policy. But they could not determine in such a way as to bind an Englishman in an English Court that such a clause with these effects was not against English public policy and therefore binding on an English subject. Your Lordships will remember the quotation

H. L. (E.) 1918

DYNAMIT ACTIEN-GESELLSCHAFT v. RIO TINTO COMPANY.

Lord Dunedin.

from Lord Alvanley's judgment in *Furtado* v. *Rogers* (1), wherein he equiparates the rule of the common law founded on public policy to an actual prohibition contained in an Act of Parliament. It is illegal for a British subject to become bound in a manner which sins against the public policy of the King's realm. I think that the Court of Appeal has expressed the same views, although they are not directly pointed to the question of acceding to a suspensory clause which ex hypothesi is against the public policy of the English law. But the general principle, as expressed by the learned judges, is the same, and with their remarks I agree.

The defendants' counsel strove to liken this case to the cases of *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (2) and *In re Missouri Steamship Co.* (3) These cases have, in truth, no application. In the *Crédit Lyonnais Case* (2) a freighter was held not excused from the duty of furnishing a cargo on the ground that the shipping of the cargo was prohibited in a foreign port by a foreign law. It was held that an impossibility due to a foreign law is not like an impossibility due to a domestic law. It is an impossibility in fact, not in law, and a supervening impossibility in fact does not excuse. That is the whole decision. In the *Missouri Case* (3) a contract of carriage which was entered into in Massachusetts was to be entirely performed in England, and the Court held that it was therefore in all respects an English contract. That being so, they held that a clause exempting the carrier from liability for default due to the fault of his servants, being a clause which was not void by the law of England as against public policy, could receive effect, and that the fact that by the law of Massachusetts such a clause would be void on that ground was an irrelevant consideration. This also has obviously no application to the question of whether an Englishman can be held in an English Court of law to be bound by a stipulation which the English Court holds it is illegal for him to undertake. The cases cited by Sankey J. are, I think, in point.

The case, therefore, fails on its speciality, and is ruled by the case of *Extel Bieber*.

My Lords, I have rested my opinion on what I consider the broader and more satisfactory ground. But, were it necessary so to

(1) 3 Bos. & P. 191. (2) 12 Q. B. D. 589.
(3) 42 Ch. D. 321.

decide, I am clear that it is for those who say that the German law is different from the English to aver it as fact and to prove it. This they have not done, and that being so the German law must be presumed to be the same as the English.

I move that the appeal be dismissed with costs.

LORD ATKINSON (dealing with the second and third cases). My Lords, I concur.

For convenience' sake the appellant companies in these two cases have in argument been styled the Königs Company and the Dynamit Company respectively. The respondent company in both these cases claims declarations similar to those claimed in the *Ertel Bieber Case*, in respect as to the Königs Company of two agreements dated respectively February 7, 1911, and March 17, 1913, and as to the Dynamit Company of two agreements dated respectively January 19, 1910, and January 28, 1913. Each of these four agreements has been in part performed, deliveries of ore having been made under each of them, and accordingly as to each of them the claim of the respondents is properly made without prejudice to the liabilities already incurred on August 4, 1914, when war between this country and Germany was proclaimed. Some controversy arose as to whether certain German words used in the clause contained in each of the four contracts dealing with the prevention of the delivery or receipt of the ore contracted for by force majeure, such as war, strikes, &c., should be the more correctly rendered into English by the word "suspended" or the word "postponed." The translator of the respondents deposed that the word "suspended" was the English equivalent, but whether he was right or not makes, in my view, no difference whatever as to the legal effect of the declaration of war upon these agreements. It is, I think, plain that the word "war" in this clause covers war between Great Britain and Germany, and prevention by war includes both the physical operation of war and the legal consequences of a state of war.

In these two cases, just as in the *Ertel Bieber Case*, the contracts purport to secure the benefit of vast transactions in trade to the appellant companies, and, through them, to their country. The suspensory or postponement clause does not completely deprive

H. L. (E.) 1918

DYNAMIT ACTIEN-GESELL-SCHAFT v. RIO TINTO COMPANY.

Lord Atkinson.

the appellant companies of the enjoyment of these benefits, nor their country of the advantages which it must be taken would result from the carrying on of that trade. It merely postpones the full enjoyment of them till the end of the war, but meanwhile it secures to the appellant companies, so far as contracts can do so, the certainty that those benefits will ultimately be enjoyed by them, and those advantages ultimately reaped by their country, should the war not outlast the periods the contracts cover. That certainly is, in my view, a great present and immediate benefit to the enemy traders, the appellant companies, in the carrying on of their trade, and, in so far as it is, it defeats one of the objects of this country in going to war, namely, to cripple the trade and commerce of Germany. It consequently is opposed to the well-known and long-recognized public policy of this country. If that be so, as I think it is, then apart from the points of difference which are said to distinguish these two cases from the *Ertel Bieber Case*, the outbreak of the war made it illegal for an English subject to carry out such a contract, and as against him the war makes it void.

I agree with the Court of Appeal in thinking that there are in each of these cases, just as there were in *Ertel Bieber's*, several clauses in the contracts unaffected by the suspensory clause which would authorize, and, if observed, necessitate, sustained and frequent commercial intercourse between the appellant companies and the respondent company, and that for that reason, in addition to the first, the contracts should, as against the respondent company, subject to the points I am about to mention, be held to have been rendered illegal and void by the proclamation of war on August 4, 1914. The first of these latter points is, as I understand it, this. Under s. 1, sub-s. 6, of the statute the plaintiff in such actions as the present must be a British subject entitled for the time being to bring an action in the High Court. By the definition clause a company incorporated in His Majesty's dominions, as is the respondent company, is included under the expression "British subject." I concur with the Court of Appeal in thinking that it is difficult to determine what class of British subject it was meant to identify by the words "entitled to bring an action in the High Court." It is possible they were used to exclude persons who, though British subjects, resided and traded in the enemy country and were there-

fore, as laid down by Lord Alvanley in *M'Connell* v. *Hector* (1), to be considered for all civil purposes as much alien enemies as if they had been born in that country. The respondent company, however, does not come within this latter class, but, as the appellants contend, is excluded from the class of competent plaintiff for another reason, namely, by reason of the form of the arbitration clause contained in each of the contracts, and this upon the authority of the well-known case of *Scott* v. *Avery* (2), followed in *Caledonian Insurance Co.* v. *Gilmour.* (3) These latter cases establish that though the parties to a contract cannot by a provision in it oust the jurisdiction of the Courts of law, they may agree, as they did in these cases, that no right of action shall accrue until a third person shall have decided upon difference arising between them touching the contract. The decision of the person named thus becomes a condition precedent to the right to sue. The arbitration clauses in these four contracts are wholly different from that of *Scott* v. *Avery.* (2) They are designed to oust the jurisdiction of the Courts altogether, not to create a condition precedent to the right to sue in them. They provide that " all disputes arising from the interpretation of the contract shall be settled by arbitration to the exclusion of the ordinary Courts." The principle of *Scott* v. *Avery* (2) has no application to such a clause. The point is, in my entirely unsustainable.

The next point is that each of these contracts was made in Germany between two German companies, the respective appellant companies and a German company, the duly appointed agents of the respondents, and is to be performed in Germany, and therefore that if about to be enforced in this country it ought to be construed and interpreted according to German law ; and further, as I understood, that if so interpreted, though it might authorize the doing of an act so injurious to the interests of this State that the act would by the public policy of this country be prohibited and made illegal, yet it should still be enforced here in the meaning put upon it according to German law and could not be held to be illegal.

That, in my opinion, is not the law. In *Kaufman* v. *Gerson* (4) Collins M.R. and Romer L.J. quoted with approval the following

(1) (1801) 2 Bos. & P. 549.
(2) 5 H. L. C. 811.
(3) [1893] A. C. 85, 90.
(4) [1904] 1 K. B. 591, 598, 599.

H. L. (E.) 1918

DYNAMIT ACTIEN-GESELLSCHAFT v. RIO TINTO COMPANY.

Lord Atkinson.

passage from Westlake's Private International Law, 3rd ed., s. 215, p. 260: "Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law. The plaintiff in such a case encounters that reservation in favour of any stringent domestic policy, with which alone any maxims for giving effect to foreign laws can be received," and held that the plaintiff, a man domiciled in France, could not recover in England from the defendant, a woman likewise domiciled in France, upon an agreement in writing made in France, to pay him a certain sum of money, the signing of which agreement he had coerced her into by threats of criminally prosecuting her husband, the consideration being the abandonment of the prosecution, though, according to French law, there was nothing illegal in the transaction. In *Grell* v. *Levy* (1) it was decided that an agreement to be carried into effect in this country which would be void on the ground of champerty, if made here, is not the less void if made in a foreign country where the contract was legal.

Erle C.J., in giving judgment, said: "Assuming, therefore, that the agreement was not illegal in the country where it was made, it becomes illegal when sought to be enforced here." No doubt the contract in this latter case was intended by the parties to be performed in England, but in *Kaufman* v. *Gerson* (2) it is expressly found that the contract was by the parties to it intended to be performed in France, yet the same principle was applied. (3) In *Hope* v. *Hope* (4) it was held that though in that case, even supposing the parties to be domiciled in France, and the agreement to be governed by French law and to be valid according to that law and to have been performed as to the parts which were invalid according to English law, it could not be enforced in England as to any part of it. Turner L.J. said (5): "A contract may be good by the law of another country, but if it be in breach, fraud or evasion of the law of this country, or contrary to its policy, the Courts of this country cannot, as I conceive, be called upon to enforce it." I emphasize the words "or contrary to its policy." In *Rousillon* v. *Rousillon* (6)

(1) (1864) 16 C.B. (N.S.) 73, 79.
(2) [1904] 1 K.B. 591, 598, 599.
(3) [1903] 2 K.B. 114.
(4) 8 D. M. & G. 731.
(5) Ibid. 743.
(6) (1880) 14 Ch. D. 351, 369.

Fry J. says: "He" (Mr. Cookson, plaintiffs' counsel) "has insisted that, even if the contract was void by the law of England as against public policy, yet, inasmuch as the contract was made in France, it must be good here, because the law of France knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this country. It appears to me, however, plain on general principles that this Court will not enforce a contract against public policy of this country, wherever it may be made. It seems to me also absurd to suppose that the Courts of this country should enforce a contract which they consider to be against public policy simply because it happens to have been made somewhere else." Well, the public policy of this country prohibits trading with the enemy by British subjects.

The strongest case, however, against the appellants' contention is, in my view, the case of *Santos* v. *Illidge* (1), when properly examined. There the action was brought against a British subject by a native of Brazil to recover damages for the non-delivery to the plaintiff in Brazil of certain slaves living in Brazil and owned by the defendant, and there sold by him to the plaintiff by a contract made in Brazil. The contract was to be performed in Brazil, and might be lawfully performed there. The question for decision was whether, having regard to the time when, the mode in which, and the purposes for which the slaves were acquired by the defendant, the holding and sale of them by him was not made unlawful by the provisions of a certain English statute, binding on defendant as an English subject, namely, 6 & 7 Vict. c. 98. The Court of Exchequer Chamber decided that on the proper construction of the 5th section of that statute the defendant was not prohibited from holding and selling these slaves in Brazil, and accordingly the plaintiff succeeded; but the whole case proceeded upon the basis that had these things been prohibited by this statute the contract could not have been enforced against the defendant in an English Court, despite the fact that it was made in Brazil and was to be performed in Brazil, and was there lawful.

I now turn to *Esposito* v. *Bowden*. (2) I find that Willes J. says that "The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by

(1) 8 C. B. (N.S.) 861. (2) 7 E. & B. 763, 781.

H. L. (E.) 1918

DYNAMIT ACTIEN-GESELLSCHAFT v. RIO TINTO COMPANY.

Lord Atkinson.

the Queen's licence. As an Act of State, done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law." Well, many proclamations forbidding trading with the enemy have been made by the Crown since the present war. Willes J. then quotes with approval the following passage from the judgment of Lord Alvanley in *Furtado* v. *Rogers* (1): "It is admitted that if a man contract to do a thing which is afterwards prohibited by Act of Parliament, he is not bound by his contract. . . . . And on the same principle, where hostilities commence between the country of the underwriter and the assured, the former is forbidden to fulfil his contract." Mr. Compston complained that he had not been given an opportunity of proving what was the proper construction of these four contracts according to the law of Germany. In the absence of that proof it must be assumed to be similar to the law of England, but even if one makes to him the very largest concession he can expect or demand, and assumes, what is extremely unlikely, that the law of Germany, and the State policy of Germany upon which the law is founded, does not in any way or to any extent prohibit trading with Germany's enemies, I think the above cited authorities clearly establish that, even if it were so, a British subject, once war breaks out, is bound not to trade with Great Britain's German enemies, that contracts binding him to do so become as to him illegal and void, and that the Courts of this country will not enforce them. The rights and liabilities of British subjects depend in these matters for their legality upon what British laws and British policy demand, and not upon what the law or public policy of Germany prescribes in reference to commercial contracts made with its subjects. The last of these three points raised by the respondents was that the proceedings under this statute (5 Geo. 5, c. 36) are not proceedings enforcing contracts, within the meaning of the foregoing authorities. But they are proceedings in which the effect of the present war upon the rights and liabilities of the parties to a contract made before the war is declared and determined. The very object of the statute was to enable these declarations to be made in the case of an enemy defendant without waiting till an action could be brought to enforce the contract. Such declarations may, in ordinary practice, be made

(1) 3 Bos. & P. 191, 198.

though no further relief be asked for. If an action were brought against the respondents for damage for breach of contract, the first step the Court would have to take would be to ascertain what the rights of the plaintiff and what the liabilities of the defendant under the contract were, and what was the effect of the war on both, before any damages could be awarded. It appears to me to be a most important step in the enforcing of the contract, and part of the process of enforcing it. I concur with the Court of Appeal in thinking that this point is as unsound as the other. I do not think it necessary to refer to those authorities dealing with the sale or management or discharge of the liabilities attaching to the real or personal property of an alien enemy situated in this country, as they do not touch the case, though often cited. I think the decision appealed from was right, and the appeal should be dismissed with costs.

LORD PARKER OF WADDINGTON. (1) My Lords, I agree.

The only substantial difference between this case and that of *Ertel Bieber & Co.* v. *Rio Tinto Co.*, which your Lordships have just decided, is that the contract to which this case relates, and under which ore was sold by the respondents to the appellants to be delivered over a series of years, was a contract in the German language and was entered into in Germany, so that it is argued that it must be construed and the rights and liabilities of the parties thereto determined according to German law. It appears that an application was made on behalf of the appellants to Sankey J. to adjourn the trial of the action in order to allow time to procure evidence of German law. This application was refused, leave being given to renew it when the action came on for hearing. The application was not in fact renewed, counsel for the appellants contending that the onus of proving what the German law was rested on the respondents. In my opinion this contention was erroneous. Until the contrary be proved, the general law of a foreign State is presumed to be the same as the law of this country. The point was recently considered by the Judicial Committee of the Privy Council in the case of *The Parchim*. (2) It follows that the onus of proving that the German law differs from the law of this country rested with the

(1) Read by Lord Sumner. (2) Ante, p. 157.

H. L. (E.) 1918

DYNAMIT ACTIEN-GESELLSCHAFT v. RIO TINTO COMPANY.

Lord Parker of Waddington.

appellants, and the appellants not having discharged this onus the presumption holds good.

Assuming, however, that the Court had heard evidence as to German law and had decided as a matter of fact that according to German law the force majeure clause in the contract covered the case of war between the United Kingdom and Germany, and that there was nothing contrary to German public policy in the clause so interpreted, this would not, in my opinion, conclude the matter in the appellants' favour. Whenever the Courts of this country are called upon to decide as to the rights and liabilities of the parties to a contract, the effect on such contract of the public policy of this country must necessarily be a relevant consideration. Every legal decision of our Courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of these facts may be the state of some foreign law, but it is not the foreign law but our own law to which effect is given, whether it be by way of judgment for damages, injunction, order declaring rights and liabilities, or otherwise. As has been often said, private international law is really a branch of municipal law, and obviously there can be no branch of municipal law in which the general policy of such law can be properly ignored. If the policy of our law renders it unlawful for a subject of the Crown to contract with a foreigner that if war break out between this country and the State of which the foreigner is a subject the latter shall be indemnified against or be relieved from or receive compensation for a loss which he would otherwise incur, no subject of the Crown can be allowed to evade the rule by entering into such a contract out of the jurisdiction and stipulating expressly or impliedly that the contract shall be governed by a foreign law. The late Mr. Westlake sums up the law on this point in the following proposition (Private International Law, 4th ed., s. 215): "Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law." There is ample authority for this proposition. The only case cited as laying down a contrary rule was *Santos* v. *Illidge* (1), but that case turned not upon any general rule of public policy but on the construction of a particular statute.

(1) 8 C. B. (N.S.) 861.

It is clear that in deciding under the provisions of the Legal Proceedings against Enemies Act, 1915, as to the effect of the war on the rights and liabilities of the parties to a contract it is the effect of the war according to English law which is to be determined or declared, and it follows, in my opinion, that the rights and liabilities in question are also the rights and liabilities of the parties according to English law. The force majeure clause in the contract in question, even if valid according to German law, must be held void in the Courts of this country as contravening a general rule of public policy. If this be so, the suggested ground for distinguishing this case from the case of *Ertel Bieber & Co.* v. *Rio Tinto Co.* entirely breaks down.

In my opinion this appeal also fails, and should be dismissed with costs.

LORD SUMNER. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, January 25, 1918.

VEREINIGTE KOENIGS AND LAURAHUETTE ACTIEN-GESELLSCHAFT FUER BERGBAU AND HUETTENBETRIEB *v.* RIO TINTO COMPANY, LIMITED.

1918. Jan. 25. LORD DUNEDIN. My Lords, this case is admittedly not distinguishable from the last, and I move that the appeal be dismissed with costs.

LORD ATKINSON (see judgment in previous case).

LORD PARKER OF WADDINGTON. My Lords, I concur.

LORD SUMNER. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, January 25, 1918.

Solicitors for the several appellants: *William A. Crump & Son.*
Solicitors for the respondents: *Slaughter & May.*

[HOUSE OF LORDS.]

H. L. (Sc.)*
1918
Jan. 28.

CHARLES R. DAVIDSON AND COMPANY . . APPELLANTS;

AND

M'ROBB OR OFFICER . . . . . RESPONDENT.

Workmen's Compensation—Accident arising out of Employment—Seaman Ashore by Leave for his own Purposes—Return to Ship—Fall from Quay—Dock under Control of Admiralty—Dock closed to Public—Admission by Admiralty Pass—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The chief engineer of a ship lying in a part of a public harbour which had been taken over temporarily by the Admiralty and was closed to the public, and to which access was granted only by an Admiralty pass, went ashore on leave for purposes of his own. On returning to the ship after dark he fell from the quay and was drowned:—

Held (by Viscount Haldane, Lord Dunedin, Lord Atkinson, and Lord Parmoor; Lord Finlay L.C. dissenting), that the control of the Admiralty did not make the quay the provided access to the ship and that the accident was not shown to have arisen out of the employment.

Stewart & Son v. *Longhurst* [1917] A. C. 249 distinguished.

Decision of the First Division of the Court of Session in Scotland, 1917 S. C. 485 reversed.

Semble: "In the course of the employment" does not mean during the currency of the engagement, but means in the course of the work which the workman is employed to do and what is incident to it; and absence on leave for the workman's own purposes is an interruption of the employment.

Dicta of Earl Loreburn in *Moore* v. *Manchester Liners* [1910] A. C. 498, 500, and of Fletcher Moulton L.J. in *Kitchenham* v. *Owners of S.S. Johannesburg* [1911] 1 K. B. 523, 526, considered.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland (the Lord President, Lord Mackenzie, and Lord Skerrington) upon a stated case under the Workmen's Compensation Act, 1906, recalling the determination of the sheriff-substitute of Aberdeen.

The respondent claimed compensation in respect of the death

* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD PARMOOR.

of her husband, Charles Officer, the chief engineer of the steamship *Ferryhill*, who was drowned on his return to the ship after being on shore with leave for his own purposes.

The sheriff-substitute held that the accident to the deceased happened in the course of his employment, but that it had not been shown that it arose out of his employment. The First Division held that it arose out of as well as in the course of the employment.

The facts are fully stated in the judgment of the Lord Chancellor.

1917. Nov. 15, 19, 20. *Condie Sandeman, K.C.*, and *Macmillan, K.C.* (both of the Scottish Bar), for the appellants. The First Division were wrong in supposing that this case was governed by the decision of the Court of Appeal (since affirmed by this House) in *Stewart & Son* v. *Longhurst.* (1) There the question was not whether the accident arose out of but whether it arose in the course of the employment. Here the question is whether the accident arose out of the employment. There the man's contract of employment caused him to be on the dock. Here the man was on the dock not on his ship's business, but on his own. But for the need to get a pass it would be conceded that the respondent would have no case. But why did the man get a pass? For his own pleasure; and the accident was an incident of his own pleasure and not of the ship's business. The mere fact of a seaman falling off a dock on his way to the ship does not make the accident an accident arising out of his employment. Then does control of the military authorities make any difference? If this were a public dock the man would not have resumed his work, and it cannot be maintained that the mere existence of the military control makes the whole of this dock a specialized means of access to the ship. At the time of the accident the deceased man was not within the precincts of his employment. [They also referred to *Moore* v. *Manchester Liners* (2) and *Parker* v. *Owners of S.S. Black Rock.* (3)]

Roberton Christie, K.C., and *A. Morrice Mackay* (both of the Scottish Bar), for the respondent. This case is within the principle

(1) [1916] 2 K. B. 803; [1917] A. C. 249.

(2) [1910] A. C. 498.

(3) [1915] A. C. 725.

H. L. (Sc.) 1918 — CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

of *Stewart & Son* v. *Longhurst*. (1) There is no difference in principle between a private dock and a public dock which has been taken over by the Admiralty. The public are not admitted, and admission is granted only to those having business on the premises. The Admiralty have converted this public dock into a private dock ad hoc. That distinguishes *Parker* v. *Owners of S.S. Black Rock*. (2) The deceased man obtained access to the dock only for the purposes of his work and he was returning by a means of access provided, though not directly, by the ship. If a seaman goes on shore with leave he is still in the course of his employment, and he is employed to get on to his ship on all occasions on which he has leave to go ashore : *Moore* v. *Manchester Liners* (3) ; *Low* v. *General Steam Fishing Co.* (4) *Richards* v. *Morris* (5) is also in point. There where a man employed on an island went by boat to the mainland with leave to see his wife, and on his return met with an accident in the boat, it was held that the accident arose out of as well as in the course of his employment ; and see *Nicol* v. *Young's Paraffin Light Co.* (6) The determination of the sheriff-substitute was upon a question of law and was so treated by him ; it is therefore open to review.

Condie Sandeman, K.C., in reply. This dock was not a means of access supplied by the ship. It was a public dock subject to the Admiralty restrictions. There is no finding that the shipowners made any arrangement at all with the dock authorities. The man himself got the permit. There was no causal relationship between the employment and the accident. [The following authorities were also referred to :—*Kitchenham* v. *Owners of S.S. Johannesburg* (7), *Webber* v. *Wansborough Paper Co.* (8), *Kerr* v. *Ayr Steam Shipping Co.* (9), *Marshall* v. *Owners of S.S. Wild Rose* (10), *Thom* v. *Sinclair* (11), *Lancashire and Yorkshire Ry. Co.* v. *Highley* (12), *Gilmour* v. *Dorman, Long & Co.* (13), *Cook* v.

(1) [1917] A. C. 249.
(2) [1915] A. C. 725.
(3) [1909] 1 K. B. 417 ; [1910] A. C. 498, 500.
(4) [1909] A. C. 523, 532.
(5) [1915] 1 K. B. 221.
(6) 1915 S. C. 439, 444.
(7) [1911] 1 K. B. 523 ; [1911] A. C. 417.
(8) [1915] A. C. 51.
(9) [1915] A. C. 217.
(10) [1910] A. C. 486.
(11) [1917] A. C. 127.
(12) [1917] A. C. 352.
(13) (1911) 4 B. W. C. C. 279.

Owners of S.S. Montreal (1), *Holness* v. *Mackay & Davis* (2), *Fox* v. *Rees and Kirby* (3), and *Craig* v. *Owners of S.S. Calabria.* (4)

The House took time for consideration.

1918. Jan. 28. LORD FINLAY L.C. My Lords, this is an appeal from a judgment of the First Division of the Court of Session allowing the claim of the respondent on behalf of herself and her children to compensation under the Workmen's Compensation Act in respect of the death of her late husband, Charles Officer. The deceased was in the employment of the appellants as chief engineer on board the steamship *Ferryhill*, which on February 25, 1916, was moored in the inner basin of Ramsgate Harbour. On the evening of that day he went ashore by leave for his own purposes, and about 10.30 P.M. was returning to his vessel, but fell into the water of the dock and was drowned. The night was extremely dark, stringent restrictions as to lighting being enforced by the naval and military authorities. The deceased had made his way through the gate at the point marked A on the plan and along the Cross Wall Quay, which separates the harbour from the inner basin as far as the corner near a bridge over a cut which he had to cross to reach the *Ferryhill*. In the darkness he missed the bridge and fell from the pier into the water about the point marked E on the plan. The widow's claim under the Workmen's Compensation Act came before the sheriff, who stated the facts as to the harbour as follows : " (12.) That the harbour of Ramsgate is a public harbour, and access to its quays has been ordinarily open to the public, but since the outbreak of war parts of the harbour have been subject to the control of the naval and military authorities, and used conform to their regulations ; (13.) that since the war began these authorities have taken control of the pier-yard, the east pier and west pier, and the Cross Wall Quay from the fish market to the powder magazine, and have also had under their control the quays of the inner basin, except the military road quay and the quay at the west end running from the ice-house to the powder magazine ; (14.) that to the parts of the harbour under the control of the said authorities there are two

(1) (1913) 6 B. W. C. C. 220.
(2) [1899] 2 Q. B. 319.
(3) (1916) 9 B. W. C. C. 459.
(4) 1914 S. C. 765.

H. L. (Sc.) 1918

CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

Lord Finlay L.C.

landward accesses, one at the point A, which at the time of the accident was in the charge of a sergeant of police, and the other at the point E, which was looked after by the military; (15.) that under the said regulations only persons wearing naval or military uniform, and persons known to have business at the harbour, are allowed to enter by these accesses the places under the control of the authorities, and all persons not wearing naval or military uniform are required to produce passes in order to be allowed entry; (16.) that passes for men in the service of the Admiralty are issued direct from the naval officer at the harbour, signed by a naval officer, and other persons receive printed passes from the harbour office, signed by the harbour-master and counter-signed by a naval officer; (17.) that the deceased, prior to leaving the harbour on the night of the accident, received a pass duly signed entitling him to return, and was in possession of the pass when later on he re-entered the harbour area at A."

The sheriff held that the accident to the deceased happened in the course of his employment, but that it had not been shown to arise out of his employment, and therefore found that the steamship owners were not liable. He stated a case, the question of law for the opinion of the Court being whether he was entitled to hold that the accident to the deceased did not arise out of his employment. In a note appended to the case the sheriff stated that he proceeded on the ground that the absence of the deceased from the ship had not been in pursuance of any duty owed to his employer, but on an errand of his own, and that the quay was common to all who had access to it, and did not form the specific means of access appropriate to the *Ferryhill*.

On appeal the Court (the Lord President, Lord Mackenzie, and Lord Skerrington) held that on the facts the accident arose out of the employment, and accordingly answered the question put in the case in the negative. From that decision the present appeal has been brought by the shipowners asking that the decision of the sheriff in their favour should be restored.

If the question were one of fact merely, there would be no appeal from the arbitrator's finding. But it appears to be quite clear from the stated case and the note appended to it that there is no dispute as to the facts, and that the question is whether in point of law upon

these facts the arbitrator was correct in holding that the accident did not arise out of the employment.

There is a long series of cases in which the question has been discussed at what point employment for the purposes of the Workmen's Compensation Act begins and ends. In *Gilmour* v. *Dorman, Long & Co.* (1) the Master of the Rolls said: "It has been repeatedly held that a man is not entitled to the protection of the Act when on his way from his home to the works. There may be some difficulty in ascertaining precisely when a man's employment begins. Generally speaking the factory gate or yard indicates the boundary." The authorities bearing on this point came under review in this House in the case of *Stewart & Son* v. *Longhurst* (2), and their effect was thus summarized by me. After a reference to the unreported case of *Cross, Tetley & Co.* v. *Catterall* the judgment proceeds: "The decision in that case established that the employment *may* begin as soon as the workman has reached his employer's premises or the means of access thereto. And in the same way the employment *may* be considered as continuing until the workman has left his employer's premises. The case would be different if the workman was at the time of the accident on the public highway on his way to or from his work. His employment cannot be considered as having begun if he is merely in transit in the public street or road to or from his employer's premises. Of course, if his employment were of a kind which is pursued on the highway he might be in the course of his employment while there, but I am speaking of cases in which he is in the public way merely in exercise of the public right of passage there on his way to or from his employer's. The present case belongs to a class of cases where the thing on which the workman is employed is lying in a dock or other open space to which he obtains access only for the purposes of his work. Actual ownership or control by the employer of the spot where the accident occurred is not essential. The workman comes there on his way to and from his work, and he *may* be regarded as in the course of his employment while passing through the dock or other open space to and from the spot where his work actually lies. Such passage is within the contemplation of both parties to the contract as necessarily incidental

(1) 4 B. W. C. C. 279, 280. (2) [1917] A. C. 249, 252, 253.

H. L. (Sc.) 1918

CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

Lord Finlay L.C.

to it." This passage appears to me correctly to state the effect of the decisions.

The question has often arisen with regard to sailors leaving and returning to their ships when they have been permitted to be absent on leave. If the ship is lying at a quay which forms part of a public highway by a river or estuary the sailor's employment for this purpose ceases when he has got off the gangway connecting the ship with the quay and it begins again on his return when he reaches the shore end of the gangway. The employer will be liable if the accident happens after the sailor on his way back has got on to the gangway, and also if he was close to the shore end of the gangway but in the darkness or fog failed to get upon it and fell into the water. On the other hand, if the ship is lying in a dock to which the public have not access as a right, and to which only persons coming on business are admitted, liability begins when the sailor enters the dock. The same principle is applied as regards the cesser of liability, and it was decided by this House in *Stewart & Son* v. *Longhurst* (1), as regards a workman who was drowned by falling into the dock on his way home at the end of his day's work on a barge lying in the dock, that his representatives were entitled to compensation under the Act. The Court of Appeal in that case (2) decided that as the man had no right to be upon the dock premises except by virtue of his employment the accident arose out of and in the course of his employment. In the report in the House of Lords it is stated that it was not disputed that the accident arose out of the employment, but this merely means that in argument it was admitted that if the man was in the course of his employment going home through the dock, it could not be disputed that the accident arose out of it, which was obvious upon the facts of that case. Pickford L.J. (3) says: "The public had no right to enter those premises by virtue of the general rights of the public, and were not exposed to the dangers which this workman by reason of his employment had to encounter. It seems to me on principle that any accident occurring to him on these premises to which he was taken only by his employment, and on which he had no right to be but for his employment, was an accident arising out of his employment, and that the relationship

(1) [1917] A. C. 249. (2) [1916] 2 K. B. 803.
(3) [1916] 2 K. B. 806.

of employer and workman did not cease till he left those premises and his position became again that of an ordinary member of the public." The same view was taken in your Lordships' House, and it was pointed out that the employment must be regarded as commencing as soon as the workman employed on a ship in such a dock has entered the dock and as continuing until he has left. It was pointed out especially by Lord Dunedin (1) that the actual ownership of the premises by the employer is for this purpose immaterial.

The appellants seek to distinguish *Longhurst's Case* (2) on two grounds. The first is that the dock in *Longhurst's Case* (2) was a private dock, to which access could be obtained only by leave of the proprietors, while in the present case the harbour was a public harbour and any restraint on access was due to precautions taken by the military and naval authorities in consequence of the war. It is not clear how far before the war members of the public, not having business there, had access to the Cross Wall Quay where the accident happened, and for the purposes of the present case it must be taken that the restriction was due entirely to the regulations of the naval and military authorities. The arbitrator states that since the war the naval and military authorities had taken possession of a great part of the harbour, including the Cross Wall Quay, that the two accesses to the shore at positions A and E on the plan were guarded by them, and that passes were required by all persons not in uniform in order to get in and out, these passes being issued to those who had business at the harbour. A pass was issued from the harbour office to the deceased before he left the harbour. It was signed by the harbour-master and counter-signed by a naval officer and entitled the deceased to return to the harbour. The deceased received this pass only by virtue of his employment on board the *Ferryhill*, and but for that employment he could not have been on the quay at all, nor could he have passed through the entrance at point A.

It is in my opinion immaterial that the control of the harbour was in this case exercised by the naval and military authorities, while it was exercised in *Longhurst's Case* (2) by the owners of the dock. The result is the same. The deceased got his pass only by reason of his employment, and but for his employment he would

(1) [1917] A. C. 256-7. (2) [1917] A. C. 249.

H. L. (Sc.)
1918
CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.
Lord Finlay L.C.

have had no access to the quay. The Court of Session held *Longhurst's Case* (1), which at that time had been decided only by the Court of Appeal, as decisive of the present case, and in my opinion they were right. There is no real difference between the two cases on this point. In each case the servant had to go to a place which had special dangers, and got access to this place solely by reason of his employment.

The second ground on which the appellants seek to distinguish *Longhurst's Case* (1) was that there the deceased was going through the docks on his way home from the barge on which he was employed, while here he had to return by the dock basin, because he had been on shore for his own purposes. I cannot regard this as making for this purpose any real difference. The question is, when does the servant return to his employment for the purposes of the Workmen's Compensation Act, so that the accident may arise out of the employment? He returns to it in either case at the same point at which he would have left it if he had been going away from the ship. If effect were given to this argument, it would deprive the sailor of the right to compensation in case of an accident after he had actually got upon the gangway on his return to the vessel, as he had to make the passage solely because he had been away for his own pleasure. After the decision in *Longhurst's Case* (1) it cannot be disputed that the entrance into the dock or portion of the harbour from which the public are excluded except on business marks the beginning or resumption of the employment in the case of a servant who lives in the adjoining town. How can it be otherwise when he is returning after a few hours spent in the town upon leave? In the nature of things the employment is resumed at the same point. In *Longhurst's Case* (1) the respondent lived on shore and met with the accident when he was going home, and the same rule would apply if while the vessel was in port a sailor had leave to go ashore for the night. Whether the man was on his own business or his master's would be very material for determining whether an accident on the public streets arose out of the employment, but it has no bearing on the question at what point the service is, in contemplation of law, resumed.

(1) [1917] A. C. 249.

A great many cases were cited to us in the course of the argument. It is only necessary to refer to a few of them.

In *Moore* v. *Manchester Liners* (1) a sailor, who had been on shore on leave, on returning had gone on to a ladder which formed the access from the quay to the ship, and fell from the ladder and was drowned. It was held that this accident arose out of and in the course of the employment. As Lord Ashbourne put it, the ladder "was the only mode by which deceased could fulfil his necessary duty of returning. This ladder attached to the ship was a requisite of it for the purposes of access, and practically for that purpose almost formed part of it. The deceased fell off the ladder whilst seeking to re-enter the ship. On the facts I arrive at the conclusion that the accident arose out of and in the course of his employment, and therefore I think the appeal should be allowed."

In *Kitchenham* v. *Owners of S.S. Johannesburg* (2) the sailor had been on shore with leave. On his return he fell from the quay before reaching the gangway which gave access to the ship. It was held that the claim failed, as it was not shown that the accident arose out of the employment. In *Kitchenham's Case* in the Court of Appeal (3) Fletcher Moulton L.J. says that he considers it to be settled by the decision of the House of Lords in *Moore* v. *Manchester Liners* (1) "that when a ship is in port and a sailor goes on shore with leave his employment is not interrupted thereby." I do not think that this is involved in the decision of the House of Lords in either *Moore* v. *Manchester Liners* (1) or *Kitchenham's Case* (2), as distinguished from observations made in the course of the judgments. The view expressed by Fletcher Moulton L.J. is apparently that on which the arbitrator acted in holding that the accident happened in the course of the employment while holding that it did not arise out of his employment.

In *Webber* v. *Wansborough Paper Co.* (4) all that was decided was that the vertical ladder on the side of the quay might be considered as part of the means of access to the ship and that, for this reason, liability attached to the employer.

In *Parker* v. *Owners of S.S. Black Rock* (5) the sailor had been

(1) [1910] A. C. 498.
(2) [1911] A. C. 417.
(3) [1911] 1 K. B. 523, 526.
(4) [1915] A. C. 51.
(5) [1915] A. C. 725.

H. L. (Sc.)
1918
CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.
Lord Finlay L.C.

on shore with leave on his own business. He fell from the pier before reaching the gangway, the ship having been moved, and it was held that the accident did not arise out of the employment. If he had been on the ship's business the owners would have been liable for any accident happening to him in the streets or on the quay, or at any other place to which the business took him.

I have already dealt fully with *Longhurst's Case* (1), and have given my reasons for agreeing with the Court of Session in thinking that there is no substantial distinction between that case and the present.

For the reasons given above I think that the accident arose out of the employment. In order that the claimant may succeed, it is, however, necessary that the accident should arise not only out of but also in the course of the employment. In my opinion the accident arose in the course of the employment in the present case substantially for the reasons which I have given when discussing the question whether it arose out of the employment. The deceased returned to his employment when he entered the harbour gates through which he got access only by reason of his employment. The word "employment" must mean the same thing when in apposition with "in the course of" as it means when in apposition with "out of." "Arising out of the employment" obviously means arising out of the work which the man is employed to do and what is incident to it—in other words, out of his service. "In the course of the employment" must mean, similarly, in the course of the work which the man is employed to do, and what is incident to it—in other words, in the course of his service. In the case of a domestic servant who sleeps and takes his meals in his master's house he is in the course of his service all the time—his service is interrupted if he goes out on his own business or pleasure. A workman who by the terms of his employment takes his meals on his employer's premises is in the course of his service in being there at meal-times. In either case the master or employer would be liable for damage caused by such an accident as happened in *Thom* v. *Sinclair* (2), as it would arise out of the employment, an incident of which is the presence of the servant or workman

(1) [1917] A. C. 249. (2) [1917] A. C. 127.

upon the premises when partaking of his meals; but different considerations might apply if the injury proceeded from choking over a morsel of food, as the act of eating may be no part of the service.

The words "and in the course of" were probably added for this reason. If the nerve or agility of a workman were impaired by the conditions of his work and in consequence he met with an accident in the street which he would have avoided but for the impairment of his health occasioned by his work, the accident might be said to arise "out of the employment." The same thing might be said in the case of an accident which he would have escaped but for fatigue induced by working overtime. The introduction of such claims is prevented by the words "in the course of the employment." Such an accident as above suggested, though it might arise out of the work, would not be in the course of the work. "In the course of the employment" does not mean during the currency of the time of the engagement. If the words meant this they would be useless, and would add nothing to the words "arising out of the employment," while to interpret them in this sense would let in the possibility of a number of claims of the nature above indicated which the words "in the course of the employment" rightly read as meaning in the course of the work or service would exclude. If "in the course of the employment" meant during the currency of the engagement a sailor engaged for a round voyage would be in the course of his employment while in a public-house in any port where he had leave to go on shore. "Course" is more applicable to work or service than to the currency of the engagement. Leave on shore on the sailor's own business or pleasure is an interruption of his employment, not in the course of it.

I have thought it necessary to state the grounds on which I hold that the accident arose in the course of the employment as the grounds on which the sheriff came to this conclusion appear to me to be erroneous in point of law. The views which I have expressed as to the meaning of the words "in the course of the employment" may not be in agreement with some expressions in some judgments, but are not, in my opinion, in conflict with any decision of this House.

For these reasons I think this appeal should be dismissed.

H. L. (Sc.) 1918

CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

VISCOUNT HALDANE. (1) My Lords, the Workmen's Compensation Act, 1906, appears on the face of it intended to afford a simple and speedy method of claiming compensation in the cases to which it relates. These are cases of personal injury by accident arising out of and in the course of the employment. But around the principle which Parliament laid down in this language there is already spreading itself in Courts of Justice an atmosphere of legal subtlety which bids fair to defeat the obvious purpose of the Legislature. Your Lordships have already made efforts to restrain the growth of obscurity and doubt by resolutely declining to interfere with the decisions of arbitrators, unless either on the face of them they disclose error in law or conclusions of fact have been arrived at without any evidence to warrant them. But as the law grows more and more in the refinements which are being developed in the course of the numerous judgments about the meaning of the double condition which the statute imposes, of the accident having to arise both out of and in the course of the employment, the liability to error in law of the arbitrators tends to become greater and greater, and their tasks become more difficult and anxious. The Courts have, of course, to interpret and apply the language used by the Legislature and nothing besides, and to face any difficulties that arise in doing so. But I feel that, while in the interpretations we who are the judges put on the words used we are bound to follow our previous decisions when they form really binding precedents, we ought, in applying the statute to particular facts, to direct our efforts rather to giving effect to broad principles with freedom in applying them to individual circumstances than to searching for guidance from mere apparent analogies with the particular facts of previous cases, analogies which rarely embody the full truth. This task is not easy to accomplish in practice, and it is a matter of the spirit rather than of the letter. But, speaking for myself, I feel that the effort must be made if the purpose which is plain on the face of this statute is not to be stultified. And I think that the only way to succeed is to regard with disfavour arguments which lay stress on the kind of analogy which I have endeavoured to indicate, as distinguished from analogous applications of broad principle.

(1) Read by Lord Atkinson.

The appeal before us illustrates the difficulty we have increasingly to face. For there have been previous cases which, resembling this one pretty closely so far as some of their particular circumstances are concerned, yet in others of their circumstances, while still presenting a considerable degree of resemblance, have been held to differ from each other in legal result, and have been decided in different senses. Features which in one aspect were the same have turned out on scrutiny to be in another aspect in reality different. That this can so readily prove to be so in cases of this class shows how essential it is to ask in the first place what is the underlying principle.

In order to come within the statute an accident must not only occur " in the course of," that is to say during, actual employment, but in addition must arise " out of " it. In other words, there is required to be shown something in the nature of a causal relation between the accident and an order, expressed or implied, given by the employer. As to how this causal relation is to be sought for and ascertained I ventured to make some observations in *Thom* v. *Sinclair* (1) about the meaning of the expressions involving causality used in the Act. To these it is not necessary for me to add anything on this occasion. Now was there anything said or done by the employers in the present case that was a cause or reason of the accident? Through their agent they, on the evening in question, allowed the dead man leave to go ashore, " for," as the sheriff-substitute found, " his own purposes and not on ship's business." He returned about 10.30 P.M. along a quay in order to get to the ship, and at a point some 60 yards from the berth where the ship lay he met with the accident. I do not, after considering the facts, think that they fall within any principle which can make this journey one for mishap in which the employers were responsible. If the employee had reached the ship or the ladders by which the ship was to be boarded he might properly be taken to have been directed to use them as being part of the vessel on which he was living as an incident of his employment. But was the quay by which he was actually approaching when the accident happened a place where he was directed to be, or a place for which the employers had any responsibility at all? It seems to me that this question ought

(1) [1917] A. C. 127, 135.

H. L. (Sc.) 1918

CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

Viscount Haldane.

on broad principles to be answered in the negative. Surely a street in Ramsgate would not have been such a place in the absence of special circumstances. That is clear from principles which have been firmly laid down. In order to make it such a place it would be necessary to prove as a special fact that the engineer was directed to use it for some object in which he was employed. Here there was no such direction. He was allowed leave for his own purposes. Was the quay, then, different in this respect from such a street? It is said that it was, inasmuch as it was the natural way of proceeding towards the place where the ship was berthed. But a street might also have been part of such a natural way. Does it make any difference that the quay was within a harbour controlled by the naval and military authorities, who had restricted its lighting and would allow no one to pass on to it unless in uniform, or having business at the harbour? Did that circumstance make the quay any the more a place for going on which the employers were responsible? It might, of course, have been such a place if some particular business of theirs had imposed on the deceased the necessity of using it. But it was his business and not theirs which imposed any necessity there was on the occasion in question. Moreover, there is nothing to show that he might not have approached the ship by a boat, or that there was any direction which precluded him from doing so. For the rest the access to the quays of the harbour was, according to the finding of the sheriff-substitute, in ordinary times open to the public.

My Lords, I have, as I was bound to do, examined the previous decisions of this House on the type of question before us. But I have examined them, not with a view to finding mere analogy of circumstances, but in order to see whether they lay down anything which, when properly applied to the facts found by the sheriff-substitute in this case, prevents me from coming to the conclusion which appears to me to result from the application of a broad principle. As the result I think that we should hold that the sheriff-substitute was right in his conclusion that the accident was not shown to have arisen out of the employment, and that the appeal should be allowed.

It is not necessary in this view to consider whether the accident in the present case can properly be said to have arisen in the course of the employment, as required by the second branch of the condition

which the statute imposes. If it were necessary to express an opinion on this point, I should find difficulty in satisfying myself that when an employee is absent on his own business an accident which happens to him happens in the course of his employment merely because he is receiving wages and may be called on to return to work. A servant who has been allowed to go on a holiday to pay a visit to his own relatives, and while with them meets with an accident wholly unconnected with his employment, can hardly be contemplated as meeting with it in the course of his employment. And if not, the circumstance that the leave of absence is only for a short time surely cannot alter the principle to be applied in deciding the question of liability. At some time this question will need consideration when it arises in a definite form. I doubt whether it was really disposed of in *Moore* v. *Manchester Liners*. (1) I had the advantage of reading in advance the judgment which has just been delivered from the woolsack in the present case, and I entirely concur with the observations on the meaning of the words " in the course of " made by the Lord Chancellor.

LORD DUNEDIN. My Lords, in deciding this case the learned judges of the First Division said that they were following the decision of the Court of Appeal in the case of *Stewart & Son* v. *Longhurst*. (2) Since the decision of this case the case of *Stewart & Son* v. *Longhurst* (2) has been affirmed by your Lordships' House. It seems to me, therefore, that the first matter to be determined is what was there decided. Now, in *Stewart & Son* v. *Longhurst* (2) the man who was injured was not a sailor on board the barge, nor had he any contract of employment with the owners of the barge. He was the servant of an outside tradesman who had contracted to repair the barge. Accordingly when he was sent to do work on the barge he was clearly in the course of his employment. He was told to go there to do his work, and in going there he was doing his work just as much as the canvasser in *M'Neice's Case* (3), approved by the Lord Chancellor in *Dennis* v. *White & Co.* (4), was doing his work when he was sent into the street to go to the customers. That was

(1) [1910] A. C. 498.
(2) [1916] 2 K. B. 803; [1917] A. C. 249.
(3) 1911 S. C. 12.
(4) [1917] A. C. 479, 483.

H. L. (Sc.) 1918

CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

Lord Dunedin.

the first point. The second point was that the accident arose out of the employment, and this is involved in the judgment, although it was not argued but conceded by the losing party. Now, to arise out of the employment it must be a risk incidental to the employment. In that case the place to which the workman was sent was necessarily the dock, because he had to traverse the dock to get to the barge. He could not on the facts have been at the dock but for the order to go to the barge; and the dock was a dangerous place, so that the danger which brought about the accident was a danger to which his employment on the occasion subjected him. The accident, therefore, arose out of the employment.

Now, here the question is a different one. The engineer was not sent to the place where he met his death on his employer's order. That, in my view, completely distinguishes the case from the case of *Stewart* (1), but it does not, of course, solve the question in favour of the employer. Only a different class of cases come into view as illustrating decision in analogous circumstances. Expressed in terms of such cases, the question would be, assuming that he was in the course of his employment, whether the case fell within the decision of *Kitchenham* (2) or of *Moore* v. *Manchester Liners.* (3)

My Lords, I have said "assuming that he was in the course of his employment," but I must now ask myself the question, Am I justified in making such an assumption? It is indeed assumed, or perhaps I should say dogmatically stated, by Lord Skerrington, who says: "The employment was continuous in the capacity of a ship's engineer, and the man having gone ashore on leave, he perished in the course of his employment." I cannot say that I am surprised at his Lordship thus expressing himself, for he had authority to go on. He had the opinion of Lord Moulton (then Fletcher Moulton L.J.) in *Kitchenham's Case* (4), and that of Earl Loreburn in *Moore* v. *Manchester Liners.* (3) With the utmost deference, I do not agree with those opinions, and I think their soundness is not involved in any judgment of your Lordships' House. I am glad to see that your Lordships who have preceded me share my view on this point.

My Lords, I shall first consider the words of the Act apart from

(1) [1917] A. C. 249.
(2) [1911] A. C. 417.
(3) [1910] A. C. 498.
(4) [1911] 1 K. B. 523.

authority. It is obvious that the addition of the words "and in the course of" are meant in some way either to qualify or further explain the words "out of." My own view is that they do the latter. It is in one sense difficult to imagine that there could be any injury held as arising out of the employment which would not also be in the course of the employment. But it may well be that the determination of the question whether at the moment of the injury the workman was in the course of his employment may go to solve the question of whether the injury arose out of the employment. Let me instance the case of the domestic servant who is run over in the street. Given but the two facts that the man is, e.g., a butler, and that he is run over in the street, you would not be able to decide whether the injury arose out of the employment or not. The facts are consistent with either supposition. But given the further fact that either (1.) he has been sent by the master on a message, or (2.) that he is enjoying an evening out, then you can determine whether he is in the course of his employment or not, and from that, if being run over is one of the inherent dangers of the street, you will be able to determine whether the injury arose out of the employment or not. Now, I have taken the illustration of a domestic servant purposely, because domestic servants are not, as colliers, and other workmen often are, engaged from day to day, but are engaged for a term, and the accident that happens is during the period of their engagement. In my view "in the course of employment" is a different thing from "during the period of employment." It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work—e.g., in the workman's case the taking of meals during the hours of labour; in the servant's, not only the taking of meals, but resting and sleeping, which follow from the fact that domestic servants generally live and sleep under the master's roof.

Holding these views as to the meaning of the Act, I disagree with the dictum of Lord Moulton (then Fletcher Moulton L.J.), who, speaking in *Kitchenham's Case* (1) of the judgment of this House in *Moore's Case* (2), said: "I consider it, therefore, to be settled

(1) [1911] 1 K. B. 523, 526. (2) [1910] A. C. 498.

H. L. (Sc.) 1918

CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

Lord Dunedin.

that when a ship is in port and a sailor goes on shore with leave his employment is not interrupted thereby." Nor do I agree with the dictum of Earl Loreburn in the case of *Moore* (1) to the effect that in the case of a continuous engagement a man is in the course of his employment if the accident happen at any place where he may reasonably be at that time.

I now turn to the point of whether I am bound to take the view which I personally do not hold in respect of decisions of this House.

My Lords, I apprehend that the dicta of noble Lords in this House, while always of great weight, are not of binding authority and to be accepted against one's own individual opinion, unless they can be shown to express a legal proposition which is a necessary step to the judgment which the House pronounces in the case. Now, the dicta I have quoted were not as dicta agreed to by Lords Macnaghten and Mersey. They were pronounced in cases in which the sailor met with the accident in the course of his return to the ship.

My Lords, I have had the advantage of reading the opinion which is about to be delivered by my noble friend Lord Atkinson. In that opinion he examines minutely all the cases decided as to sailors going from or returning to their ship. I concur in the view he takes of them, and it is unnecessary to duplicate such an examination. The upshot of it is that there is no case where liability has been found in which the accident has occurred at any place other than what may be termed the provided access to the ship. If an accident occurs there it may well be, and I agree it is involved in the decisions, that when a sailor is leaving his ship by the provided access, or has reached the provided access on his return, he has not left the course of his employment in the first case—in the second he has returned to it. And obviously, if the provided access is defective, as was the case in *Moore's Case* (1), it is easy to come to the conclusion that the accident arose out of the employment. I am therefore of opinion that the general proposition as to continuous employment enunciated by Lord Loreburn in *Moore's Case* (1) was unnecessary to support the decision. In *Kitchenham's Case* (2) it could not be involved, inasmuch as liability was not found.

It follows that in my view the mere fact in the present case that the man was under engagement as an engineer at the time that

(1) [1910] A. C. 498. (2) [1911] A. C. 417.

the accident happened is not enough to entail the consequence that the accident happened in the course of his employment. None the less, it may be that he was in the course of his employment. As the course of his employment was interrupted when he left the ship for his own purposes, so it would be resumed when he returned to the ship. If, therefore, the place at which the accident happened was in any fair sense the access to the ship, then the accident would be in the course of his employment. Now, admittedly it is not shown that he was on the gangway or on anything that served as a gangway. The only ground for holding that he was within what might be termed the access to the ship lies in the fact that he was in the harbour, and that the harbour on the occasion was not open to the public.

My Lords, I cannot think that the action of the military authorities in drawing a cordon round certain places turns what is a public place into an access to the ship. In *Stewart's Case* (1) the dock was the theatre of the man's employment, because he was sent there, and he had to traverse the place. The point of the dock being a private dock was that it prevented the presence of the man there being the presence of a man in a public street going to his work, but that work not yet begun. In the present case the fact that the man would not have been admitted unless he had been a privileged person, and that his privilege arose from the fact that he was sleeping on board a ship which was lying in the dock, was a matter entirely of the arrangement of the military authorities, and had nothing to do with the relations between his employers and him.

I am therefore of opinion that the result at which the arbitrator arrived was right, and ought not to have been interfered with by the learned judges of the First Division. I think that the appeal should be allowed, and the judgment of the arbitrator restored; the respondent to pay the costs of the appeal and expenses in the Court below.

LORD ATKINSON. My Lords, I concur.

It has been, as I understood, pressed in argument on behalf of the respondent in this case that the case of *Moore* v. *Manchester*

(1) [1917] A. C. 249.

H. L. (Sc.) 1918

CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

Lord Atkinson.

Liners (1) establishes two propositions—(1.) that if a sailor bound to serve as such on a particular ship for a certain time lawfully goes ashore within that time without having been bidden so to do by one in authority over him whom he was bound to obey, but merely on his own business or for his own pleasure, he must be considered to continue to be in the course of his employment while he remains on shore; and (2.) that if an accident should happen to him while on his return journey to his ship, that accident may be held to have arisen out of and in the course of his employment, no matter how lengthened that journey may be, or at what part of it he met with the accident. When the facts of this case, as well as of those cases which have preceded and followed it dealing with the same subject, are examined, I think it will be found that they furnish no support whatever to this wide second proposition, if they do even to the first. In *Moore* v. *Manchester Liners* (1) the deceased fireman went ashore lawfully, without having been bidden to do so, on his own business or for his own pleasure. He was to return to his ship, and was attempting late at night to do so. The only means of access to the ship provided by her master or owner was a ladder, not fixed, but swaying about. It was found to be an unsafe contrivance for getting on board. The deceased in attempting to go on board fell off this ladder and was drowned. The case is somewhat peculiar owing to the marked division of judicial opinion to which it gave rise. In the Court of Appeal (2) Cozens-Hardy M.R. and Farwell L.J. held that the accident did not arise either out of or in the course of the employment of the deceased. Fletcher Moulton L.J. held that the deceased was in the course of his employment while he continued ashore, stating as one of his reasons that there was no moment, whether the sailor was on board or ashore, when he was not bound to obey the captain's order. I cannot find that this was found as a fact by the county court judge, or that any evidence was given in support of it, and, in the absence of authority, I confess I doubt it. On the question of the accident having arisen out of the employment he appears to me to have based his judgment on the defectiveness of the means of access provided. He dealt

(1) [1910] A. C. 498. (2) [1909] 1 K. B. 417.

with the case of *McDonald* v. *Owners of S.S. Banana* (1), and showed that the claimant there failed because all that was proved was that the returning seaman fell off the gangway leading from the quay to the ship, and there was no evidence that this provided mode of access was defective. He also cited *Robertson* v. *Allan Brothers & Co.* (2) In that case the sailor, who was somewhat under the influence of drink, on returning on board, in order to avoid observation, crossed from the quay on a certain skid, a forbidden mode of access, and not by the usual mode of access. In stepping from this skid to the deck he slipped on the deck and fell down an open hatchway and was killed. He was held entitled to recover. The learned Lord Justice, referring to the case then before him, said (3): "The ladder was, for the purpose of the employment, the proper and provided access to the ship, and falling from it appears to me to be in every respect identical from a legal point of view with falling from the end of the cargo skid in the case quoted." In each of these three cases the decision was based on the defective nature of the means of access from the shore to the ship. In *Kitchenham* v. *Owners of S.S. Johannesburg* (4) Fletcher Moulton L.J. had occasion to consider the question of the liability of employers for an injury sustained by two sailors who had been absent on leave and were returning to their respective ships. In the first case the means of access to the ship was a gangway which was properly lighted; there was no evidence, however, whether the sailor had or had not reached the gangway before he fell into the water and was drowned. It was held that it was not proved that the accident arose out of the sailor's employment and that the owners, were, therefore, not liable. If the argument put forward in the present case were sound the result must have been the opposite, for undoubtedly the sailor fell from the quay on his way back to his ship, and it would have been immaterial whether he had reached the gangway or not. In the second case there was another ship lying between the quay and the sailor's own ship, and to get to the latter he had to cross a gangway between the two ships. He reached the gangway, fell off, and was drowned.

(1) [1908] 2 K. B. 926.
(2) (1908) 98 L. T. 821.
(3) [1909] 1 K. B. 426.
(4) [1911] 1 K. B. 523; [1911] A. C. 417.

H. L. (Sc.) 1918

CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

Lord Atkinson.

It was held that the owners were liable. Before this case came to be decided in the Court of Appeal the case of *Moore* v. *Manchester Liners* (1) had been brought on appeal to this House. The judgment of Fletcher Moulton L.J. in it was expressly approved of by one, possibly by two, of the noble Lords who took part in the hearing, and expressly disapproved of by two others, especially on the point of the continuous employment of the sailor while on shore. Lord Ashbourne, who concurred with the conclusion at which the Lord Chancellor arrived, based his judgment apparently on the defective nature of the means of access to the ship. He said (2): "The mode of access to the ship was by a ladder which was not fixed and which swayed, and, in the words of the judge, was an unsafe contrivance. But it was the only mode by which deceased could fulfil his necessary duty of returning. This ladder attached to the ship was a requisite of it for the purposes of access, and practically for that purpose almost formed part of it." He said nothing whatever upon the point whether the sailor in that case should be held to have been in the course of his employment all the time he was ashore. It was, I think, quite unnecessary for the decision of the case so to hold. It was enough for the purposes of that decision if the sailor was, while using the provided means of access to the ship, held to be in the course of his employment. My Lords, it may well be that when a sailor returning to his ship uses the only means of access to her provided for him, means which he is obliged to use in order to get on board his ship as he may be bound to do, he should be held, while using those means for that purpose, to be doing something in the course of his employment; but that is a wholly different thing from holding that a sailor who, with the leave of his master, goes ashore for the purposes of his own business or his own amusement, continues all the time he remains ashore to be in the course of his employment. To hold so appears to me, with all respect, to confound the continuity of the contract of service with the continuity of the course of employment. Lord James of Hereford, the third member of the majority of the House, concurred in the conclusion at which the Lord Chancellor had arrived, and said: "If the deceased man was rightfully away from the ship it would certainly be within his

(1) [1910] A. C. 498, 504, 505. (2) [1910] A. C. 502

duty, and so within his employment, to return to the ship. He did so by the ladder from which he fell, the only means of reaching the ship provided for him." Again: "More stress was laid on the words 'in the course of the employment.' My Lords, if the accident arose during the employment, and arose out of it, I find it difficult to say, on the facts of this case that this accident did not take place in the course of the employment." If the judgment stopped there it would be quite consistent with it that the sailor only re-entered on his employment when he attempted to traverse the ladder, and that, therefore, when the accident occurred he was in the course of the employment, which was all that was needed; but the noble Lord added: "I accept the judgment of Fletcher Moulton L.J. on the point." It may well be that Lord James by this last sentence intended to state that, in his view, a sailor rightfully ashore on his own business, or for his own pleasure, was, during all the time he remained on shore, whatever he might be doing while there, still in the course of his employment; but I do not think that even by his express adherence to that view the decision of the case can be treated as a clear and unequivocal decision of the House upon this point in favour of the claimant. In my view the words "arising out of" suggest the idea of cause and effect. The words "in course of his employment" mean, I think, while the workman is doing something he is employed to do. In the case of a sailor who lives on board his ship, or an indoor servant who lives in his master's house, these words would of course cover and include things necessarily incidental to his service there—such as taking his meals, sleeping, resting, &c. In satisfying these demands of nature the sailor is as truly doing something within the course of his employment as he would be in keeping a look-out or going aloft.

Fletcher Moulton L.J. in his judgment in *Kitchenham's Case* (1) deals with his judgment in *Moore* v. *Manchester Liners* (2) in a passage which, though somewhat long, it is well to quote. It runs thus: "In the cases before us the accident occurred on the return of the seaman to the ship immediately prior to his actually getting on board. This is the critical moment when the dangers to which he is exposed change from being of the one class to being of the

(1) [1911] 1 K. B. 523, 527. (2) [1909] 1 K. B. 417.

H. L. (Sc.) 1918

CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

Lord Atkinson.

other class." By this, as appears from the context, the Lord Justice means the dangers to which he would be exposed as a member of the public, as distinguished from those to which he would be exposed as one of the crew of the ship. He then proceeds: "And it will frequently be a difficult task to draw the line between the two. But I do not think it difficult to lay down the general principle by which our decisions ought to be guided. The return to the ship is in the course of his employment, but the risks do not become risks arising out of his employment until he has to do something specifically connected with his employment on the ship. Thus, if the risk is one due to the means of access to the ship, as in *Moore* v. *Manchester Liners* (1), the accident is rightly said to arise out of his employment; but if the accident is shewn to arise from something not specifically connected with the ship it cannot be said to arise out of his employment. I do not think that the dividing line is when he actually touches the ship or the special means of access thereto. For instance, if it was shewn that when the sailor returned to the ship there was a dense fog and that in trying to find the gangway, which I will suppose was not lighted, he fell in the water and was drowned, I think that the accident would arise out of his employment. But if all that is shewn is that it occurred during his return to the ship but while he was still on the shore, and before he had taken any specific step towards getting on board the vessel, I think that it would not thereby be established that the accident arose out of his employment." This case is not only an authority upon the question as to where the risk to which a returning sailor is exposed becomes a risk so arising out of his employment that if he meets with an accident caused by it his employer may be liable. It is also an authority upon the point that an applicant or his representative must in such cases as this prove his or her case. The evidence showed that the sailor returning after being absent on leave came upon the wharf and walked towards the ship's gangway. It was not shown that he ever reached the gangway. The watchman proved that he had not heard any one on the gangway– a splash was heard a little abaft the inboard end of the gangway, and there was a cry from some person unknown "Man overboard!" Fletcher

(1) [1909] 1 K. B. 417; [1910] A. C. 498.

Moulton L.J., dealing with this evidence, said: "In my opinion this is not sufficient to negative the possibility that the accident was due to an accidental slip on the wharf or to the sailor having gone to the edge of the wharf for his own purposes (perhaps to look over in order to see the state of the tide) and fallen over." (1) The decision in the case of *Marshall* v. *Owners of S.S. Wild Rose* (2) is precisely on the same lines on this latter point, as indeed is *Wakelin* v. *London and South Western Ry. Co.* (3) Reverting to the first point, I think I am safe in saying that we have not been referred to any case where a sailor returning to his ship recovered compensation for an injury by accident which he sustained unless he met with that accident by reason of the defective or insufficient character of the physical means provided by the owner for access to or egress from the ship to the quay or dock wall. In *Cook* v. *Owners of S.S. Montreal* (4) Buckley L.J., as he then was, laid it down that "in the obligations contractually existing between master and servant, it is part of the duty of the master to afford the workman when he is dismissed, reasonable facilities for leaving the place of employment, and that if the servant is injured while availing himself of those facilities the master may be liable." That statement of the law and also the decision in *Kitchenham* v. *Owners of S.S. Johannesburg* (5) were approved of in *Webber* v. *Wansborough Paper Co.* (6) In this last-mentioned case the means of egress from the ship provided by the master was a plank with one end resting on the vessel and the other resting on the rung of an upright iron ladder, fixed to the quay wall. The seaman on going ashore, his day's work being done, walked along the plank in safety, but after he had gone a step or two up the ladder he slipped, fell into the harbour, and got injured. Lord Moulton said the county court judge appeared to him to have been of opinion that the ladder on which the plank landed the workman was not such a safe portion of the quay that the responsibility of the employer ceased when he had put the workman there. This in other words means that the mode of egress provided for those going from the ship to a safe place upon the quay was defective

(1) [1911] 1 K. B. 528.
(2) [1910] A. C. 486.
(3) (1886) 12 App. Cas. 41.
(4) 6 B. W. C. C. 220, 223.
(5) [1911] 1 K. B. 523; [1911] A. C. 417.
(6) [1915] A. C. 51.

H. L. (Sc.) 1918

CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

Lord Atkinson.

and that the accident was caused by reason of the defect. Thus, the risk to which the workman was exposed, and from which he suffered, was due to the defective means of egress from the ship, and, therefore, arose out of the employment which obliged him to avail himself of those means and encounter that risk.

In the face of these authorities it is, I think, impossible to hold that the risk to which the deceased in the present case was exposed as he walked along these quays had, before the accident, changed from that to which an ordinary wayfarer on the pier would be exposed to that to which the deceased became exposed by virtue of his being a member of the crew of his ship. The risks to which he was exposed, therefore, did not arise out of his employment, since he had not up to the time of the accident done or attempted to do anything specially connected with his employment on the ship. His employment was not, I think, to any extent the cause of the accident, proximate or remote.

The principle contended for on behalf of the respondent would lead to the most astonishing and, I think, unjust results. If it were sound, then a master who allowed his domestic servant to go on a visit to his friends in the country on the condition that he should return on a certain day, if not sooner recalled, would be liable for an injury sustained by the servant in a railway accident when on his return journey to his master's house on the day named.

I am well aware that it has been decided by the cases of *Caledonian Ry. Co.* v. *Walker's Trustees* (1) and *London Tramways Co.* v. *London County Council* (2) that a decision of this House on a point of law is conclusive and binds the House in subsequent cases; but the decision itself, with every thing necessary involved in it, is the thing which binds. For the reasons I have already given I do not think it can be taken that this House in *Moore* v. *Manchester Liners* (3) did decide as a point of law arising on construction of the Workmen's Compensation Acts that a sailor while and so long as he is lawfully on shore solely for the purposes of his own business or his own pleasure must be held to continue to be in "the course of his employment." Your Lordships have not been referred to any other decision of this House so ruling. I cannot find any such myself. I

(1) (1882) 7 App. Cas. 259, 275. (2) [1898] A. C. 375.
(3) [1910] A. C. 498.

do not think such a decision exists, and, unless constrained by some decision of this House, I am very unwilling to decide as a matter of law that under these Acts a servant absent from his master's house or premises, no matter for what purpose of his own, must, while his contract of service lasts, be taken to continue in the course of his employment with that master though he should not be engaged in doing anything or preparing to do anything which the master employed or commanded him to do.

It was contended on the part of the respondent that the present case is governed by the case recently decided of *Stewart & Son* v. *Longhurst*. (1) My Lords, I cannot bring myself to think so, though, of course, I must feel my confidence in my own opinion somewhat shaken by the fact that my noble friend on the woolsack has come to a different conclusion. *Stewart & Son* v. *Longhurst* (1) was one of those cases, of which several have been decided recently, in which an employer who expressly or impliedly orders his workman to do a particular thing has been held to be responsible for an accident caused to the servant by a risk ordinarily attending the doing of that thing. For instance, if a master should send his servant into the street to post a letter, and the servant while on that errand is run over in the street, the master is held responsible, because being run over is one of the ordinary street risks. In *Longhurst's Case* (1) the owner of a barge got liberty from the owner of private docks to place his barge in these docks for the purpose of having her repaired. He employed the deceased mechanic to repair her. He therefore necessarily hired him and impliedly ordered him to traverse the docks from the dock gates to the place where the barge lay by the route provided by the dock owners, and, on knocking off work, to retraverse the docks by this same route. As between the workman and the employer the relative rights and obligations of the parties were the same as if the docks were the private close of the employer. The conditions under which the work was done must be taken to have been known to the employer. There was no allegation of neglect by the workman. He was on these premises, using this way of approach to his work, and from his work to the dock gates under his master's implied orders, by virtue of his employment, and in no other character, or

(1) [1917] A. C. 249.

H. L. (Sc.) 1918

CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

Lord Atkinson.

by virtue of no other right. He then without any negligence strayed off his route when leaving his work and fell into the docks. The risk of doing so was, under the condition, I think, a risk incidental to the doing of the work he was by his master hired and commanded to do. Had the workman been walking about the private docks for his own pleasure, not by his master's orders, there might be some analogy between that case and the present; but in fact it was entirely otherwise.

The harbour of Ramsgate was at one time a public harbour. The Admiralty have since the war assumed control over it and its quays and piers. The respondent contends that this control turned the docks into such a private close as were the docks in *Longhurst's Case*. (1) Under the regulations made by the naval authorities persons wearing naval or military uniform and having business within the harbour are allowed by the authorities to enter it by certain places of access, and, in order to entitle them to enter, they must possess passes signed in the manner prescribed. It is scarcely necessary to say that no authority was produced to show that where the military, for the purposes of the war, draw a cordon around a certain area and only permit certain persons, duly authorized, to pass in or out of that area, that circumstance turns the area within the cordon into the private property of any person, certainly not the private property of such a person as was the employer of the deceased in the present case, by whom or for whom the control was not imposed. Moreover, the authorities might give passes to whomsoever they pleased, might even allow the general public to pass through the entrances if they thought fit. The deceased obtained a pass on his way out in order that he might return again; but he was not ordered by his employer to go out. He was not sent to do any business for his employer. He owed no duty whatever to his employer to go out of or to stay in the harbour. The only duty he owed to him was to be back in his ship that night. He might have never obtained a pass, never gone out of the harbour, have spent the evening in some ship within the harbour amongst his friends, and walked about upon the quay or pier from which he subsequently fell, according as he desired, irrespective altogether of the wishes of his employer. Everything he did, with the exception above

(1) [1917] A. C. 249.

mentioned, he did, not by the orders express or implied of his master, or to discharge any duty he owed to his master, but on his own initiative for his own purposes, and according to his own desire, so that even if the harbour of Ramsgate could be considered to stand as between the employer and his workman in this case in the same relation as did the private docks stand in the *Longhurst Case* (1), which I hardly think it could, I should still be of opinion that this case is as different from the *Longhurst Case* (1) as would be the case of a servant who was run over in the street while he was walking there for his own business or pleasure from the case of such a servant who was run over in the street while walking there on some errand on which he had been sent by his master. I think the authorities establish that in the former case the servant would fail to recover. For these reasons I am of opinion that the claimant on whom the burden of proof lies has failed to establish that the accident by which the deceased met his death arose either out of or in the course of his employment, and that the order appealed from was therefore erroneous, should be reversed, and the appeal be allowed with costs.

LORD PARMOOR. (2) My Lords, the question in this appeal is whether the sheriff-substitute has made an error in law in holding that the accident to the deceased did not arise out of the employment with the appellants. In my opinion no error in law arises in the case, and there is no ground in law for interfering with the finding of the sheriff-substitute. I desire to add that there is no necessity in this case to become involved in a multiplicity of decisions.

On the evening of February 25, 1916, the deceased man left his ship *Ferryhill* and went ashore for his own purposes, and not on ship's business. He returned to the harbour about 10.30 P.M., and, passing through an entrance, by means of a pass duly signed and entitling him to do so, went on the quay with the object of making his way to his ship. No one witnessed the accident to the deceased, but the sheriff-substitute drew the inference that, as the deceased was proceeding towards his ship, he missed his way owing to the darkness prevailing, and, falling into the harbour, was drowned.

(1) [1917] A. C. 249.

(2) Read by Lord Dunedin.

H. L. (Sc.) 1918

CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

Lord Parmoor.

The body was found about 20 yards from the point of access to the ship from the quay, and was probably near the place of the accident. In ordinary times the harbour is a public harbour, and access to its quays has been ordinarily open to the public ; but since the outbreak of the war the quay where the accident happened has been subject to the control of the naval and military authorities, and used conform to their regulations. The deceased, prior to leaving the harbour on the night of the accident, received a signed pass entitling him to return, and was in possession of the pass when he re-entered the harbour area.

On these facts the sheriff-substitute found in effect that it was not proved that the accident to the deceased arose out of his employment. In my opinion the sheriff-substitute drew the inference that at the time when the accident happened the deceased was on the quay for his own purposes, and not on ship's business. There is evidence from which in reason this inference could be made, and if this is so, the decision is, under this head of the case, wholly within the competence of the sheriff-substitute. The only other way in which an error in law could arise would be that the sheriff-substitute did not apply the statutory directions in testing the question of liability, or, in other words, that he misdirected himself as to the meaning of the Legislature as expressed in the statute. I can find no indication that he made any such error. On the contrary, I think that he applied the right direction, namely, whether at the time of the accident the deceased was engaged in the duty or business of his employment, and whether, if he was so engaged, there was some form of causal relationship between such duty or business and the accident. No doubt the place where the accident happened is an important factor, but it is not a conclusive factor. For instance, in the present case it is in my opinion very material to draw a clear distinction between a workman on his way to, or on his return from, his work and a workman who is absent from his work for his own purposes. The proper inference in any particular case is one of fact, and not of law, subject always to two conditions, that the inference can, in reason, be made from the evidence, and that the statutory directions of the Act have been properly observed. With all respect to the opinion of the Lord President, I am unable to accept the view that it is immaterial whether the deceased went

ashore on his own business or the ship's business, or that the question in debate in the appeal is governed by the case of *Stewart & Son* v. *Longhurst*. (1)

That case comes within the category of cases which determine, that if a workman meets with an accident when using an access, or means of access, provided by his employer, and where the workman had no right to be except by virtue of his employment, such accident, in the absence of special circumstances, is incurred in the course of and arises out of the employment, so as to make the employer liable to pay compensation. In some cases, if an accident is incurred in the course of employment the only possible inference is that it also arose out of the employment; but this is not necessarily the case, and to entitle a claimant to compensation the two conditions must be fulfilled in any particular case. In the Court of Appeal Warrington L.J. refers to the view expressed by Farwell L.J. in *Gane* v. *Norton Hill Colliery Co.* (2) Speaking of a collier, Farwell L.J. says: "He is employed not only to work in the pit, but also to do other things that he is entitled to do by virtue of his contract of employment; for example, he is entitled to do, and therefore employed to do, such acts as coming on the employer's premises, passing and repassing for all legitimate purposes connected with his work on the premises. . . . . All those things that he is entitled to do by virtue of his contract he is for the purposes of the Act employed to do, and they are therefore within his contract of employment." My Lords, I desire to express my entire concurrence in the view expressed by Farwell L.J., but it does not appear to me to have any application to a case in which a man employed on a ship is, at the time of the accident, away on his own account and not on the ship's business. I agree with what was said by Lord Dunedin when the case came on appeal to your Lordships' House. (3) "'Control' was sought to be raised to the position of affording an absolute test whether employment had begun or ceased. I venture to go so far as to say that control of the place where an accident happens, so far from being conclusive, is neither here nor there except in so far as it may represent a fact tending to show that the accident arose in the course of the employment. The cases of

(1) [1916] 2 K. B. 803; [1917] A. C. 249.

(2) [1909] 2 K. B. 539, 545.

(3) [1917] A. C. 249, 256.

H. I. (Sc.) 1918

CHARLES R. DAVIDSON AND COMPANY v. M'ROBB OR OFFICER.

Lord Parmoor.

Gilmour v. *Dorman, Long & Co.* (1) in England and *Hendry* v. *United Collieries* (2) in Scotland are both illustrations of positions where there was control on the part of the employer of the locus of the accident, and yet no liability. These cases were, in my opinion, rightly decided."

My Lords, in my opinion the appeal should be allowed, with costs here and below.

Interlocutor of the First Division of the Court of Session in Scotland reversed and determination of the sheriff-substitute restored. The respondent to pay the costs of the action in the Court of Session and also the costs of the appeal to this House.

Lords' Journals, January 28, 1918.

Agents for appellants: *Botterell & Roche, for L. Mackinnon & Son, Advocates, Aberdeen, and Boyd, Jameson & Young, W.S., Leith, Edinburgh.*

Agents for respondent: *Joseph N. Nabarro, for Henry J. Gray, Advocate, Aberdeen, and Murray & Brydon, S.S.C., Edinburgh.*

(1) 4 B. W. C. C. 279. (2) 1910 S. C. 709; 3 B. W. C. C. 567.

[HOUSE OF LORDS.]

HOUSTON AND OTHERS . . . . . APPELLANTS; H. L. (Sc.)*

AND 1918

BURNS AND ANOTHER . . . . . RESPONDENTS. *Jan.* 29.

Charitable Bequest—Uncertainty—"Public, benevolent, or charitable purposes"—Limitation to particular Locality.

A bequest for public purposes to be selected by a third party, though limited to a particular locality, is void for uncertainty.

Blair v. *Duncan* [1902] A. C. 37 applied.

Dictum of Lord Romilly in *Dolan* v. *Macdermot* (1867) L. R. 5 Eq. 60 overruled.

A testatrix by her trust disposition and settlement directed her trustees to apply the residue of her estate "for such public, benevolent, or charitable purposes" in connection with a particular parish as they should think proper:—

Held, that the words describing the purposes were to be read disjunctively, and that for this purpose the punctuation of the clause might be regarded; and that the bequest was void for uncertainty.

Decision of the Second Division of the Court of Session in Scotland affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary so far as appealed from.

Mrs. Annabella Turnbull, widow of the Rev. Thomas Hardie Turnbull, one of the ministers of the parish of Lesmahagow, by her trust disposition and settlement dated June 2, 1894, directed her trustees, in the events which happened, to apply the residue of her estate "for such public, benevolent, or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood in such sums and under such conditions as they in their discretion shall think proper." The testatrix died on October 23, 1894.

The question for determination upon the appeal was whether this bequest was void for uncertainty. The Lord Ordinary (Lord Ormidale) held that the bequest was not void: the Second Division,

* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

H. L. (Sc.) 1918 HOUSTON v. BURNS.

by a majority (the Lord Justice-Clerk and Lord Salvesen, Lord Dundas dissenting) held that it was.

The first-named respondent did not appear upon the appeal. The other respondent, the Lord Advocate, represented the Crown as ultimus haeres, the testatrix having left no heirs who were entitled to succeed to her estate ab intestato.

1917. Dec. 17, 18. *Chree, K.C.* (with him *M. P. Fraser*) (both of the Scottish Bar), for the appellants. This residuary bequest is not void for uncertainty. *Blair* v. *Duncan* (1) decided that a bequest "for such charitable and public purposes as my trustee shall think proper" without any restriction as to locality was too vague, and the absence of such restriction was relied on by Lord Robertson, in whose judgment Lord Shand concurred, and by Lord Brampton. That case has no application where the operation of the gift is limited to a particular locality. Such a bequest stands on a different footing and can be carried into effect by the trustees without any difficulty. It is competent to a testator in the disposition of his property to select particular classes of individuals or objects and to empower his trustees after his death to apply any part of his property to any particular individuals or objects in that class. All that is required is that the description of the class to be benefited shall be sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator: *Hill* v. *Burns* (2); *Crichton* v. *Grierson* (3); *Dundas* v. *Dundas* (4); *Dolan* v. *Macdermot* (5); *Weir* v. *Crum-Brown* (6); *Cleland's Trustees* v. *Cleland* (7); *Allan's Executor* v. *Allan* (8); *Hay's Trustees* v. *Baillie* (9); *Mackinnon's Trustees* v. *Mackinnon* (10); *M'Phee's Trustees* v. *M'Phee.* (11) [He also discussed and distinguished *Grimond* v. *Grimond* (12), *Shaw's Trustees* v. *Esson's Trustees* (13), and *M'Conochie's Trustees* v. *M'Conochie* (14), in all of which cases

(1) [1902] A. C. 37.
(2) (1826) 2 Wils. & S. 80.
(3) (1828) 3 Wils. & S. 329, 338.
(4) (1837) 15 S. 427.
(5) L. R. 5 Eq. 60; affirmed (1868) L. R. 3 Ch. 676.
(6) [1908] A. C. 162, 167.
(7) 1907 S. C. 591.
(8) 1908 S. C. 807, 814.
(9) 1908 S. C. 1224.
(10) 1909 S. C. 1041.
(11) 1912 S. C. 75.
(12) [1905] A. C. 124.
(13) (1905) 8 F. 52.
(14) 1909 S. C. 1046.

the gift was held bad.] See also *Goodman* v. *Saltash Corporation* (1), per Lord Cairns. In Scotland there is no Statute of Elizabeth, and the Scottish Courts have not defined the term "charitable bequest" with the same precision as the English: *Hill* v. *Burns* (2); *Crichton* v. *Grierson* (3); *Magistrates of Dundee* v. *Morris.* (4) [Upon this point he also referred to *Baird's Trustees* v. *Lord Advocate* (5) and *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (6)] But both in England and in Scotland bequests of a charitable nature are to be construed benevolently: *Magistrates of Dundee* v. *Morris* (7); *Weir* v. *Crum-Brown.* (8) In this bequest the word "public" should be read as qualifying "benevolent" and "charitable," so that it is a bequest to benevolent and charitable purposes of a public nature. That at least is a possible construction, and, if so, having regard to the character of the bequest, it ought to be adopted, ut res magis valeat quam pereat.

Clyde, K.C. (Lord Advocate and Dean of Faculty) (with him *J. W. Forbes* (of the Scottish Bar)), for the Crown. The local limitation does not here sufficiently define the class to be benefited: *M'Conochie's Trustees* v. *M'Conochie* (9); *Shaw's Trustees* v. *Esson's Trustees.* (10)

Chree, K.C., replied.

The House took time for consideration.

Jan. 29. LORD FINLAY L.C. My Lords, the question in this case is as to the validity of a clause in the trust disposition and settlement of Mrs. Turnbull, dated June 2, 1894. The testatrix directed that the residue of her estate should be disposed of as she should direct by any writing or codicil under her hand. The clause then proceeded as follows: "And failing any such then I hereby direct my trustees to hold such residue until such time or times as they see fit and apply the same for such public,

(1) (1882) 7 App. Cas. 633, 650.
(2) 2 Wils. & S. 80.
(3) 3 Wils. & S. 329, 343,
(4) (1858) 3 Macq. 134, 154.
(5) (1888) 15 R. 682.
(6) [1891] A. C. 531.
(7) 3 Macq. 134.
(8) [1908] A. C. 162, 167.
(9) 1909 S. C. 1046.
(10) 8 F. 52.

H. L. (Sc.) 1918 HOUSTON v. BURNS. Lord Finlay L.C.

benevolent, or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood in such sums or under such conditions as they in their discretion shall think proper."

No direction in writing or by codicil was given by the testatrix, and the question arises whether the bequest for public, benevolent, or charitable purposes is good. It has been settled by a decision of this House (*Blair* v. *Duncan* (1)) that a bequest "for such charitable or public purposes as my trustee thinks proper" is void for uncertainty. In such a clause the words "charitable or public" are used disjunctively, and, as Lord Shand says, "a bequest for public purposes to be taken by a person or persons named by the testator, unlike a bequest expressly limited to a charitable purpose, is not sufficiently definite, but is too vague and wide to form the subject of a valid bequest." While "charitable purposes" have a defined meaning both in England and Scotland, "public purposes" are in their nature entirely uncertain. The same rule has been applied in *Grimond* v. *Grimond* (2), reversing the decision of the Court of Session (3), in the case of a bequest to "such charitable or religious institutions or societies" as the trustees might select. The term "religious" was held to be too vague, and as the words were to be read disjunctively the bequest was void on the principle which was applied in *Blair* v. *Duncan*. (1)

Mr. Chree, for the appellants in the present case, sought to distinguish these authorities on the ground that there was no local limit in the bequests there, while in the present case the purposes are to be in connection with a particular parish or the neighbourhood. It is quite true that the absence of any restriction as to locality is adverted to in some of the judgments in *Blair* v. *Duncan* (1) as adding an additional element of vagueness to the bequest. Lord Robertson says: "It seems to me that this testatrix has done nothing like selecting a particular class or particular classes of objects. She excludes individuals, and then leaves the trustee at large, with the whole world to choose from. There is nothing affecting any community on the globe which is outside the ambit of his choice." But while this consideration emphasized the

(1) [1902] A. C. 37, 42, 47. (2) [1905] A. C. 124.
(3) (1904) 6 F. 285.

vagueness of the bequest in the particular case, it was not really necessary for the decision, which rests upon the vagueness of the purpose, whatever the locality within which the purpose is to be served. This sufficiently appears from the judgments of Lord Halsbury, Lord Shand, and Lord Davey in *Blair* v. *Duncan* (1), and the vagueness of the purpose itself, apart from locality, is pointed out in the clearest terms by Lord Robertson himself. The addition of a local limit might well make a difference in favour of a bequest if the bequest was in favour of institutions within a certain area, the particular institution to be selected by the trustee. This distinction is pointed out by Lord Stormonth-Darling in his judgment in *Shaw's Trustees* v. *Esson's Trustees* (2), where the whole subject is discussed in a very lucid and valuable judgment. Mr. Chree relied in support of his contention upon the case of *Dolan* v. *Macdermot* (3), where the Master of the Rolls, Lord Romilly, after saying that a bequest for such public purposes as the trustees select would be bad, goes on to say that if a place is connected with the gift, so that the public purposes must be for the benefit of the place specified, then it is good. I do not think this dictum is correct. The decision of Lord Romilly was affirmed on appeal (4) by Lord Cairns L.C., but not on this ground.

It follows from the decision to which I have referred that if the clause is to be construed as being for such public or benevolent or charitable purposes in connection with the locality as the trustees think proper it would be bad. The purpose is too vague, and the vagueness of the purpose is not cured by the specification of the locality to be benefited. It was contended, however, on behalf of the appellant that the clause should not be read as applying to public or benevolent or charitable purposes, but that on its true reading it was for the benefit of benevolent or charitable purposes of a public nature in connection with the parish, and that so construed it would be good, as " benevolent or charitable purposes " would be held to be charitable purposes. It appears to me that without the punctuation which appears in the will as printed in the appendix this is quite a possible construction, and where

(1) [1902] A. C. 37, 42, 47.
(2) 8 F. 52, 54.
(3) L. R. 5 Eq. 60.
(4) L. R. 3 Ch. 676.

H. L. (Sc.) 1918 HOUSTON v. BURNS. Lord Finlay L.C.

words are ambiguous a construction should be adopted which will not make the bequest void. But we are informed that the comma after the word "public" and that after the word "benevolent" appear in the original will, and this points plainly to the conclusion that "public" was intended as an alternative to "benevolent or charitable." In other words, that the clause must be read disjunctively.

The authorities as to the effect to be given to punctuation in a will are not quite uniform. In *Sanford* v. *Raikes* (1) Sir W. Grant says: "that it is from the words, and from the context, not from the punctuation, that the sense of a will must be collected"; and in *Gordon* v. *Gordon* (2) Lord Westbury said obiter that he concurred in the opinion so expressed by Sir W. Grant. But there are opinions the other way. Wood V.-C. (3), as reported in a note to *Walker* v. *Tipping* (4), Sir John Romilly M.R. in *Gauntlett* v. *Carter* (5), and Knight Bruce L.J. (see the note to *Manning* v. *Purcell* (6)) expressed the opinion that the punctuation in the original will might be looked at for the purpose of helping in its construction. I think that for this purpose the punctuation of the original will may be looked at, and, reading this clause as punctuated, the words "public, benevolent, or charitable" are clearly to be read disjunctively. It follows that the bequest is bad for uncertainty.

In my opinion the appeal should be dismissed.

VISCOUNT HALDANE. (7) My Lords, by the law of Scotland, as by that of England, a testator can defeat the claim of those entitled by law in the absence of a valid will to succeed to the beneficial interest in his estate only if he has made a complete disposition of that beneficial interest. He cannot leave it to another person to make such a disposition for him unless he has passed the beneficial interest to that person to dispose of as his own. He may, indeed, provide that a special class of persons, or of institutions invested by law with the capacity of persons to hold property, are to take

(1) (1816) 1 Mer. 646, 651.
(2) (1871) L. R. 5 H. L. 254, 276.
(3) In *Oppenheim* v. *Henry*, Jan. 18, 1853.
(4) (1852) 9 Hare, 800, 803.
(5) (1853) 17 Beav. 586, 589, 590.
(6) (1855) 24 L. J. (Ch.) 522, 523.
(7) Read by Lord Dunedin.

in such shares as a third person may determine, but that is only because he has disposed of the beneficial interest in favour of that class as his beneficiaries. There is, however, an apparent exception to the principle. The testator may indicate his intention that his estate is to go for charitable purposes. If these purposes are of the kinds which the law recognizes in somewhat different ways in the two countries as charitable, the Courts will disregard a merely subordinate deficiency in particular expression of intention to dispose of the entire beneficial interest to a class, and will even themselves, by making a scheme of some kind, give effect to the general intention that the estate should be disposed of for charitable purposes. To the expression "charitable" the Courts respectively of the two countries attach the meanings which were discussed in this House in *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (1) It is not necessary in this appeal to define the significance of the expression, for all that is necessary on this occasion is to point out that by other decisions of this House, such as *Blair* v. *Duncan* (2), it has been settled that the expression "public purposes" has a wider meaning than "charitable purposes," and includes much that does not fall within the latter expression. To take the illustration given by Lord Robertson in advising this House in *Blair* v. *Duncan* (2), if a trustee handed over a sum of money to an election fund or a Yeomanry regiment, he would be giving it for a public but not for a charitable purpose. Trusts for charities have been regarded with favour as constituting a particular class recognized as sufficiently definite to enable a testator to leave his property on such a trust, and to empower a third person to determine the shares in which those falling within the class are to participate in his bounty. Trusts for public purposes have not been regarded by the Courts as constituting a class so particular and definite as to be capable of taking under an analogous disposition.

In the case before us the direction to the trustees is to hold the testator's residue "for such public, benevolent, or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood in such sums and under such conditions as they in their discretion shall think proper." Notwithstanding the

(1) [1891] A. C. 531. (2) [1902] A. C. 37.

H. L. (Sc.) 1918 — HOUSTON v. BURNS. — Viscount Haldane.

reference to Lesmahagow or its neighbourhood, the purposes are not the less of the very general and indefinite character which is all that the word "public" connotes. And I am of opinion that the word "or," especially as the commas which follow appear in the original will, shows what the testatrix intended was to make a disjunction. The disposition is therefore inoperative as regards the residue, for the trustees are not bound to distribute the property among objects restricted to any defined class which can form a valid object of a disposition.

I think that the appeal must therefore be dismissed.

Lord Atkinson. My Lords, having regard to the wording and punctuation of the clause in the will of the testatrix, upon which the question for decision in this case turns, I do not think it can be legitimately construed as if it ran "Public purposes, either benevolent or charitable," or "purposes benevolent or charitable of a public character." I think the Lord Justice-Clerk was right in assuming that the clause meant the same thing as if it ran thus, "Public purposes or benevolent purposes or charitable purposes"; the conjunction "or" being in each case disjunctive. If the clause stopped there and contained no reference to the parish of Lesmahagow or its neighbourhood, it would appear to me to be clear, on the authority of *Blair* v. *Duncan* (1), that the bequest would be void by reason of the vagueness and uncertainty of the words "public purposes," no particular class or particular classes of individuals or objects being defined or precisely indicated from amongst which the trustees are empowered to make their selection of the recipients of the bounty of the testatrix. The bequest therefore does not satisfy the test suggested by Lord Lyndhurst in *Crichton* v. *Grierson*. (2)

No doubt in *Blair* v. *Duncan* (1) there was no indication of a defined area within which the public purposes were to be comprised. The testatrix, to use Lord Robertson's words (3), "excludes individuals, and then leaves the trustee at large, with the whole world to choose from. There is nothing affecting any community on the globe which is outside the ambit of his choice"; but the

(1) [1902] A. C. 37. (2) 2 Wils. & S. 329.
(3) [1902 A. C. 47.

vast extent of this "ambit of choice" was not the only thing which, in the opinion of the House, rendered the bequest in that case void. It was rendered void, according to Lord Halsbury, because a disposition which left it to the trustee to determine what particular public purpose should be the object of the trust was too vague and uncertain for any Court, either in England or Scotland, to administer. And it was void, according to Lord Davey, because "public purposes" were not so within the description of a particular class of objects as to satisfy the test which Lord Lyndhurst suggested. The purposes which would come within the description were, as he pointed out, vast in number, and were sometimes of a kind which would have reduced the gift in the case before him to an absurdity. It is the insufficiency of these words, "public purposes," because of their vagueness and uncertainty, to identify and fix the limits of the class of individuals or objects from which the trustees are to choose that renders void a bequest for "public purposes." That is their weakness, and that weakness is not cured by coupling them with a definition or description of the physical area within which the public purposes are to be comprised. It may possibly be that the words "public purposes" are more vague and uncertain where the trustees have the whole world as the ambit of choice than where the ambit is limited to a much smaller area, but they are sufficiently vague and uncertain, even if applied to parishes, to render them insufficient to define and fix the limits of the class or classes from which the trustees are to make their selection.

My Lords, I do not think that this case has the slightest resemblance to those in which property is vested in trustees to be applied for the support or benefit of such institutions of a particular class as may be in existence, or in the course of creation, in any given town or area at the time at which the will speaks. There is no vagueness or uncertainty in such cases at all. The class from which the trustee is to make his choice can be at once ascertained and identified; but if, as in the case of *Shaw's Trustees* (1), the trustees are not confined to applying the trust funds for the benefit of such institutions, objects, charitable, benevolent, or religious, as they may select from amongst those existing in the limited area at the time from which the will speaks, but are at liberty to

(1) 8 F. 52.

H. L. (Sc.) 1918 HOUSTON v. BURNS. Lord Atkinson.

institute within the area any new religious objects or purposes they think fit, the whole definition then becomes loose again. This was well pointed out by Lord Stormonth-Darling in his judgment in the latter case.

My Lords, it is, I think, fallacious to contend that because it must now be taken as established that, according to the law of Scotland, the Courts will give effect to a bequest for charitable purposes to be selected by a third party, they ought by analogy to give effect to a bequest for "public purposes" to be similarly selected. As Lord Davey pointed out in *Blair* v. *Duncan* (1), the expression "charitable" is not as vague as the word "public," but, whether it be so or not, a long course of decision has established on the one hand the validity of a bequest for such charitable purposes as an individual should select, and on the other the invalidity of a similar bequest for such public purposes as an individual should select.

My Lords, I think the passage cited from the judgment of Lord Loreburn in the case of *Weir* v. *Crum-Brown* (2) by some of the judges in the Second Division has really been divorced from the particular matter to which it referred. Lord Loreburn said the recipients of the bounty were, amongst other things, to be widowers or bachelors of fifty-five years of age or upwards, whose lives had been characterized by sobriety and other specified virtues. They were to be indigent, a provision which stamps the bequest as charitable. These conditions were not really canvassed in argument, and need not be further considered, for no one of them is such as to impart to the bequest an uncertainty which will disentitle it in law. The only point seriously made against the contested clause in that will was that the recipients of the charity were to be persons who have "shown practical sympathy in the pursuit of science." Lord Loreburn then deals with the criticisms made by counsel on this particular clause, and in reference to them makes use of the language quoted. Lord Macnaghten deals with the same clause. He shows that the word 'science" is by no means a word of a definite or particular meaning; that there are many enactments in favour of institutions for the advancement of science, and that the generality of the word had never prevented the

(1) [1902] A. C. 37. (2) [1908] A. C. 162, 166, 167, 169.

Court from applying to the particular case before it the provisions of the Act under consideration. As to the words "practical sympathy," he said, though not happily chosen, they are perfectly intelligible; that the wish of the testator was to help those who were in need of help and who may have done something, much or little, in the way of promoting some branch of science. Lord Robertson, after saying that the case was perfectly clear, proceeded to say (1): "If it is said of any one that he has shewn practical sympathy in the pursuits of science, this is merely a roundabout way of saying that he has helped the pursuits of science; just as to show practical sympathy in A.B. means to help A.B. Again, the word 'science' embraces a wide but perfectly ascertainable range of subjects. Accordingly I consider the meaning of this testator to be plain and intelligible."

I do not think it is legitimate to treat Lord Loreburn's observations as laying down an absolute rule for the solution of all doubts in the construction of clauses in wills such as that to be construed in this case. I think the appeal fails, and should be dismissed.

LORD SHAW OF DUNFERMLINE. My Lords, by the trust settlement of Mrs. Turnbull she directed her trustees to hold the residue of her estate "till such time or times as they shall see fit and apply the same for such public, benevolent, or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood, in such sums and under such conditions as they in their discretion shall think proper."

The Lord Advocate maintains that this bequest is void from uncertainty, and that, as Mrs. Turnbull left no heirs entitled to succeed to her property ab intestato, the residue thereof falls to the Crown as ultimus haeres.

Mr. Chree, in his admirable argument, admitted that a bequest "for such public, benevolent, or charitable purposes" as the trustees might select would, if these purposes were construed disjunctively, be void. This admission was inevitable in the state of the authorities. These need not be resumed. *Blair* v. *Duncan* (2) and *Grimond* v. *Grimond* (3) are directly in point.

(1) [1908] A. C. 169. (2) [1902] A. C. 37.
(3) [1905] A. C. 124.

H. L. (Sc.) 1918 HOUSTON v. BURNS. Lord Shaw of Dunfermline.

But, it was suggested, the words "public, benevolent, or charitable purposes" can, and therefore should, be read conjunctively as meaning charitable purposes which are of a public and benevolent nature. So, it was said, the gift was only meant to be applied to charities, in which case the law would protect it as valid, and would write out therefrom benevolence or charities which were of a private nature. I cannot so read the words themselves. The punctuation also is against such a reading. I beg to give my special concurrence with the opinion just delivered from the woolsack on this latter subject. Punctuation is a rational part of English composition, and is sometimes quite significantly employed. I see no reason for depriving legal documents of such significance as attaches to punctuation in other writings. Taking the phrase as it is framed, it seems to me impossible to exclude from its range public purposes as such, and therefore public purposes which are not necessarily of a charitable character. Accordingly everything with a public purpose—say party political propaganda selected by the trustees for the advantage or proper enlightenment, in their opinion, of the parishioners of Lesmahagow—could be financed from the funds of Mrs. Turnbull's trust.

In the eye of the law charity has this saving grace, that it is held to be by itself denominative of a distinct class. This extends far. But the law has taken a firmer and more rigorous line in regard to public or religious purposes. It demands from the testator the selection by himself of the particular classes of individuals or objects. The classes may be wide, but they must be definite and clear. The ambit of the classes being thus fixed by the testator, then a power of selection within that ambit may be entrusted to others.

Substantially, the argument of the appellants was that this law against uncertainty, now too well established to be shaken, does not apply in the present case, because the uncertainty and consequent ineffectiveness of the bequest are removed by the local limitations imposed. But, my Lords, local limitations expressed by the words "in connection with the parish of Lesmahagow or the neighbourhood" do not add any definiteness to the class of purposes or objects which it was in the mind of the testator to benefit or promote. The foundation of political clubs, schools of

art, a zoological garden, or an astronomical observatory in Lesmahagow, along with a thousand other things in connection with that parish or its neighbourhood, might, in the trustees' opinion, be excellent, but the bequest is void by reason of the uncertainty as to which of them or which class of them the truster meant to favour. This is exactly the reason which invalidates the bequest where there is no geographical reference.

Local limitations do come into play and make the bequest effective if and when they provide the means of identifying the particular objects or institutions which the testator has meant to benefit. I am of opinion that the local connection cannot limit the area of selection of purpose, unless the reference of the testator is to persons, societies, agencies, or institutions actually existing or projected to be established in a particular district.

I agree respectfully with the opinions in the case pronounced by the Lord Justice-Clerk and Lord Salvesen.

Lord Dunedin. My Lords, I have had the advantage of seeing the opinion which has just been delivered by the noble and learned Lord on the woolsack; that opinion so clearly and precisely expresses the views I have formed on the case that it is unnecessary that I should trouble your Lordships with any further remarks.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed.

Lords' Journals, January 29, 1918.

Agents for appellants: *Grahames & Co., for Moncrieff, Warren, Paterson & Co., Writers, Glasgow, and Webster, Will & Co., W.S., Edinburgh.*

Agents for respondent, the Lord Advocate: *Treasury Solicitor, for James Ross Smith, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* 1918 Jan. 31.

LEYLAND SHIPPING COMPANY, LIMITED . APPELLANTS;

AND

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED . . . . . RESPONDENTS.

Insurance (Marine)—Ship—Total Loss—Causa Proxima—Novus Casus Interveniens—Perils of the Sea—"Warranted free from all consequences of hostilities"—Ship injured by Torpedo ultimately Lost by Sinking.

A ship was insured against (amongst other things) perils of the sea by a time policy containing a warranty against all consequences of hostilities. The ship, while on a voyage from South America to Havre, was torpedoed by a German submarine twenty-five miles from Havre. The torpedo struck her well forward and she began to settle down by the head, but with the aid of tugs she reached Havre on the evening of the same day, when she was taken alongside a quay in the outer harbour. A gale sprang up, causing her to bump against the quay, and the harbour authorities fearing that she would sink and block the quay, ordered her to a berth inside the outer breakwater, where she was moored. She remained there for two days, taking the ground at each ebb tide, but floating again with the flood, and finally her bulkheads gave way, and she sank and became a total loss.

The shipowners brought an action on the policy claiming to recover as for a loss by perils of the sea:—

Held, that the grounding was not a novus casus interveniens, and that the torpedoing was the proximate cause of the loss; and that consequently the underwriters were protected by the warranty against all consequences of hostilities.

Reischer v. *Borwick* [1894] 2 Q. B. 548 approved.

Decision of the Court of Appeal [1917] 1 K. B. 873 affirmed.

APPEAL from an order of the Court of Appeal. (1)

The question raised by the appeal was whether the appellants, who were the owners of the steamship *Ikaria*, were entitled to recover from the respondents as underwriters in respect of the total loss of

* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

(1) [1917] 1 K. B. 873.

the ship under a time policy of marine insurance on the ship against the usual marine perils, but subject to the clause known as the f.c.s. clause—"Warranted free of capture seizure and detention and the consequences thereof or of any attempt thereat piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war." The *Ikaria* was torpedoed by a German submarine on January 30, 1915, and foundered in the outer harbour of Havre on February 2. The appellants contended that the ship was lost by a peril of the sea. The respondents contended that the loss was caused by the torpedoing, and that they were protected by the warranty against the consequences of hostilities.

The facts are fully stated in the judgments of the Lord Chancellor and Viscount Haldane.

Rowlatt J. came to the conclusion on the facts that the loss was a loss by hostilities and held that the respondents were not liable, and his judgment was affirmed by the Court of Appeal (Swinfen Eady L.J. and Bankes L.J., Scrutton L.J. doubting but not dissenting).

1917. Dec. 10, 11, 13. *Leslie Scott, K.C.* (with him *Norman Raeburn*), for the appellants. This was a vessel which had suffered a particular average loss by being torpedoed, but the total loss was by perils of the sea. The aggravation of the original injury by the bumping against the quay and the successive groundings converted the partial loss into a total loss. The chain of causation between the injuries caused by the torpedo and the ultimate sinking of the vessel was broken by the series of events which occurred in Havre. The respondents therefore are not protected by the warranty against the consequences of hostilities. The use of the word "consequences" does not enlarge the ambit of the causa proxima rule. The only effect of the warranty is to take out of the policy the perils mentioned in it: *Ionides* v. *Universal Marine Insurance Co.* (1) There is a distinction between cases of marine insurance and those of other liabilities, and according to the English law the last cause only must be regarded and the others rejected,

(1) (1863) 14 C. B. (N.S.) 259, 285, 289; 32 L. J. (C.P.) 170, 174, 176.

H. L. (E.) 1918

LEYLAND SHIPPING COMPANY v. NORWICH UNION FIRE INSURANCE SOCIETY.

although they contributed to the result. The loss must be immediately connected with the cause: *Pink* v. *Fleming* (1); *Becker, Gray & Co.* v. *London Assurance Corporation* (2); *Livie* v. *Janson* (3); *Ionides* v. *Universal Marine Insurance Co.* (4); *The Xantho* (5); *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (6); *Woodside* v. *Globe Marine Insurance Co.* (7) [He also referred to the following cases of non-marine insurance:—*Winspear* v. *Accident Insurance Co.* (8), *Lawrence* v. *Accidental Insurance Co.* (9), *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.* (10), and *Fidelity and Casualty Co. of New York* v. *Mitchell.* (11)] *Reischer* v. *Borwick* (12), upon which the decision of the Court of Appeal was founded, is, as explained by Scrutton L.J., inconsistent with the previous authorities, and especially with *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (6), and ought to be overruled. The original cause of the loss is not the proximate cause unless the vessel is inevitably doomed thereby to destruction. The loss being primarily due to a peril of the sea, it is for the respondents to prove that it was due to one of the excepted perils, and they have failed on the facts to discharge that onus. The true meaning of Rowlatt J.'s findings is that as long as the vessel was in deep water she was safe and that it was the breaking of her back by the grounding which caused the total loss.

R. A. Wright, K.C., and *Simey*, for the respondents. Under a policy of this description the underwriters are not to be liable if the direct, or a direct, cause of the loss is a consequence of hostilities. Has this loss been directly caused by hostilities? It is said that for this purpose time alone is to be looked at—that it is only the last event which is to be regarded. But "immediate" or "direct" as applied to the cause of a loss is used in the sense that there is an unbroken sequence between the casualty and the loss—that there is no intervening cause in which is merged the original casualty. If the hostilities were the operative cause of the loss the Court is not limited

(1) (1890) 25 Q. B. D. 396, 398.
(2) Ante, pp. 101, 112.
(3) (1810) 12 East, 648, 653.
(4) 14 C. B. (N.S.) 259; 32 L. J. (C.P.) 170.
(5) (1887) 12 App. Cas. 503, 514.
(6) (1887) 12 App. Cas. 518.
(7) [1896] 1 Q. B. 105.
(8) (1880) 6 Q. B. D. 42.
(9) (1881) 7 Q. B. D. 216.
(10) [1909] 1 K. B. 591, 598.
(11) [1917] A. C. 592.
(12) [1894] 2 Q. B. 548.

to the occurrence which is last in point of time. The subsequent events in the harbour must be taken to be part of the torpedoing. If the vessel had not been so badly damaged forward she would not have broken up as she did. The whole network of circumstances is the direct result of the torpedoing. Assuming that perils of the sea were also a proximate cause, where there are two perils both of which are proximate causes of the loss and in an open policy the shipowner could have recovered on either, then, if one of those perils is excepted by the warranty the underwriters are not liable : *Cory & Sons* v. *Burr* (1) ; and see *St. Paul Fire and Marine Insurance Co.* v. *Morice.* (2) *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (3) and *The Xantho* (4) are concerned with the difference between a contract of marine insurance and a contract of affreightment and are not in point. [They also referred to *Jones* v. *Schmoll* (5), *France, Fenwick & Co.* v. *North of England Protecting and Indemnity Association* (6), *British and Foreign Steamship Co.* v. *Rex* (7), *Green* v. *Elmslie.* (8)]

Norman Raeburn replied.

The House took time for consideration.

Jan. 31. LORD FINLAY L.C. My Lords, this is an appeal from a judgment of the Court of Appeal affirming the judgment of Rowlatt J. in favour of the respondents, the defendants in the action.

The action was brought by the appellants on a policy of marine insurance upon the steamship *Ikaria.* This policy was in the ordinary form, covering, inter alia, perils of the seas, but contained the following clause : " Warranted free of capture seizure and detention and the consequences thereof or of any attempt thereat piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war."

The appellants (plaintiffs) alleged that the vessel was lost by perils of the seas, while the respondents (defendants) contended that the

(1) (1883) 8 App. Cas. 393, 399-401.
(2) (1906) 11 Com. Cas. 153.
(3) 12 App. Cas. 518.
(4) 12 App. Cas. 503.
(5) (1785) 1 T. R. 130, n.
(6) [1917] 2 K. B. 522, 525.
(7) [1917] 2 K. B. 769.
(8) (1794) Peake, 278.

H. L. (E.) 1918

LEYLAND SHIPPING COMPANY v. NORWICH UNION FIRE INSURANCE SOCIETY.

Lord Finlay L.C.

loss was in consequence of hostilities or warlike operations, and was therefore excluded by the clause above quoted.

The *Ikaria* was on a voyage from South America to Havre and London. When stopped on January 30, 1915 (Saturday), about twenty-five miles north-west of Havre for the purpose of taking up a pilot, she was struck abreast of No. 1 hatch by a torpedo fired by a German submarine. Two large holes were made in the vessel, and No. 1 hold filled with water. The crew went on board a tug, fearing that the *Ikaria* might sink at once, but as she kept afloat they returned to her and brought her into the outer harbour of Havre. She was moored alongside the Quai d'Escale, where she was always afloat and would have been saved if she had been allowed to remain there. A gale sprang up on the 31st (Sunday), causing the vessel to range and bump against the quay. The port authorities were apprehensive that she might sink, blocking the quay (which was urgently required for purposes connected with the war), and ordered that she should leave the quay and either be beached outside the harbour altogether, or anchored in the outer harbour near the breakwater, spoken of in the evidence as the Batardeau. The latter position was chosen, and the vessel was anchored with her head towards the Batardeau. There was a good deal of wind and sea. As the vessel was very much by the head in consequence of the damage done by the torpedo, at each low tide the vessel took the ground forward, while the rest of her structure was water-borne. She was thereby subjected to considerable strain, and, the bulkhead between No. 1 and No. 2 holds having been weakened by the explosion of the torpedo, the forward end crumpled up and she became a total loss on Tuesday, February 2. The appellants (plaintiffs) contended that her loss was due to the perils of the seas at her anchorage in the outer harbour. The respondents (defendants) contended that it was caused by hostilities. Both Courts below have held that it was so caused by the torpedo, and that, as the warranty applied, the respondents were not liable.

In my opinion Rowlatt J. and the Court of Appeal were right in holding that the loss of this vessel was a consequence of hostilities, and therefore not covered by the policy sued on.

The only chance of saving the vessel after she had been struck by the torpedo was to take her into port, and Havre was obviously the

proper port to take her to. The decision of the harbour authorities that the vessel could not be permitted to remain at the Quai d'Escale was final. That decision was given for very intelligible and weighty reasons, and there is no ground for thinking that the port authorities committed any error of judgment in ordering the removal, but those in charge of the ship had to obey the order, right or wrong. The Quai d'Escale consequently was no longer available for the vessel. The case must be dealt with just as if the episode of the vessel's being taken to that quay had not occurred and she had been taken in the first instance straight to the anchorage near the Batardeau. What was the cause of her becoming a total wreck there? In my opinion, in substance, it was the injury by the torpedo.

The injuries received from the torpedo made it impossible for the vessel to keep the sea. She was taken into port. At the anchorage to which she was ordered she took the ground forward at low tides as her draught forward was 32 feet (owing to the injury caused by the torpedo) as against 15 feet aft, and she was greatly strained by the seas in this position. No. 1 bulkhead, which had been seriously weakened by the explosion of the torpedo, gave way, the vessel breaking her back, crumpling up forward and becoming a total wreck. She was not lost by any new peril, but by the natural consequences of the explosion of the torpedo.

On February 3, 1915, the captain, writing to his owners from Havre, says that on February 2 the Nos. 1 and 2 bulkheads gave out with a crash, and goes on to say: "I am practically certain that the vessel's back is broken in two places between the bridge and the stem, viz., on the fore part of No. 2 hatch, and again abreast the No. 1 hatch, and the side plating in both those places is very badly buckled, and the sheer of the ship is quite broken from the bridge forward to the forecastle hold, which is plainly visible from the shore." In a letter of February 4 he says: ". . . . the ship from forward to amidships has absolutely foundered. Apparently the torpedo has wrecked the ribs and keelsons in the forward end, and then her weight being water-borne aft and on the ground forward has broken her back and opened her out forward. Her condition is hopeless." In his letter of February 10 the following sentence occurs: "It seems evident from the very sudden way in which the forward end of the vessel crumpled up that her structure was so

H. L. (E.) 1918

LEYLAND SHIPPING COMPANY v. NORWICH UNION FIRE INSURANCE SOCIETY.

Lord Finlay L.C.

weakened by the terrific force of the explosion that there was no strength left to resist the additional strain imposed on her, firstly, by the great weight of water against the bulkheads and afterwards by the bursting strain of the cargo as it swelled in the holds."

It was argued for the appellants that the torpedoing could not be regarded as the proximate cause of the loss of the vessel, as there was a novus casus interveniens, namely, the grounding in the outer harbour and the breaking of the back of the vessel by the consequent straining. Rowlatt J. deals with this contention in the concluding passage of his judgment: "Was the grounding a new thing supervening which caused the damages? I cannot think so at all. Those were circumstances which, if you like, thwarted the attempt to save the ship. I grant you that, but they did not constitute a new departure as a casualty. I really cannot say more upon the law than that. Here you have a torpedoed ship which makes for harbour. She finds a berth where she might be saved if she could stay there. She cannot stay there. She has to move on again. She goes to a berth where she cannot be saved, and in fact where, in the effort to keep her there, she receives some slight further damage; but all through she is under the operation of the original torpedoing, and all the struggles that she made, whether she received further injury in the course of them, as she did to some extent undoubtedly, when she bumped on the quay and took the ground at the Batardeau, and all the efforts she made before she became a total loss, were merely efforts to escape from that casualty in the grip of which she was throughout." Swinfen Eady L.J. says (1): "As the policy against sea perils in the present case contained a warranty against all consequences of hostilities or warlike operations, the question arises, Was the loss, assuming it to be by a peril of the sea, the proximate consequence and effect of hostilities? The facts show that the vessel was severely damaged by a torpedo, and that, although every effort was made to save her, she sank and was lost early on the third day afterwards. If to prevent her sinking she had been run ashore immediately after the accident and had become a total loss, the loss would certainly have been the direct consequence of hostilities. Does it make any difference that between two and

(1) [1917] 1 K. B. 873, 884.

three days were spent in abortive and unavailing efforts to save her? She was in imminent risk of sinking from the moment of being injured; she was removed from the Quai d'Escale because of the evident risk of her sinking there; she was unable to remain at that quay, and never was able to reach and remain in any place of safety; the fact that she was so much down by the head prevented her removal to the inner harbour; she had the choice of going outside the breakwater with a view to being beached, or of remaining within the outer harbour; the latter was chosen, but, having regard to her draught, she was bound to ground at every tide at the place where she was moored, unless she could be considerably lightened and her draught lessened, which proved to be impracticable. The risk of her grounding there was deliberately incurred as part of the salvage operations. The train of causation from the act of hostility to the loss was unbroken. She was never out of immediate danger from the time she was first injured to her final loss, and the efforts to save her were acts done by way of salvage. There was not any new intervening cause of loss after the injury by torpedo, no new casualty causing the damage." Scrutton L.J. was disposed to differ, although in consequence of his view of the effect of the decision in *Reischer* v. *Borwick* (1) he in the end concurred with the other members of the Court of Appeal. After referring to Rowlatt J.'s finding that the vessel was sunk from her bulkheads giving way, having been weakened by the explosion, and from the strain of the grounding, or, in other words, from grounding in her damaged condition, Scrutton L.J. (2) goes on to say: "I agree with these findings, but I think it also follows, whatever the legal effect may be, that the sinking did not necessarily follow from the explosion; that is to say, that with fine weather, and a stay in the first berth, the ship would have been saved; with the weather she in fact met, and in the berth to which in consequence of that weather she was ordered, she was lost."

I agree with Rowlatt J. and the majority of the members of the Court of Appeal in their view of the facts and of the legal effect of these facts, and I cannot share the doubts expressed by Scrutton L.J. The vessel could not remain at the Quai d'Escale, and

(1) [1894] 2 Q. B. 548. (2) [1917] 1 K. B. 891.

H. L. (E.)
1918
LEYLAND SHIPPING COMPANY v. NORWICH UNION FIRE INSURANCE SOCIETY.
Lord Finlay L.C.

her short stay there was merely an interlude which may be disregarded. In taking the vessel to the anchorage near the Batardeau the best practicable course was adopted to save her. The effort was unsuccessful. She sustained further damage there owing to the fact that in consequence of the injury by the torpedo she took the ground forward at low tides. She was consequently strained severely by the motion of the seas, and this, coupled with the weakened condition of the bulkhead caused by the explosion, led to her ultimate break-up. Such circumstances do not prevent the injury by the torpedo from being the proximate cause of the loss; indeed they appear to me to establish that the loss was a direct consequence of hostilities.

A great many cases were cited to your Lordships. I do not propose to deal with them in detail. The principles of law are well settled, and the question here is really one of fact. A great deal was said in the Court of Appeal about the case of *Reischer* v. *Borwick*. (1) I cannot see that that case introduced any novelty into the law of marine insurance. The policy was against damage received in collision with any object. The ship ran against a snag, which made a hole in her. The vessel was anchored and the hole plugged, and a tug was sent to bring her to dock for repairs. Owing to the motion through the water when being towed, the plug came out and the ship sank. It was held that the loss of the ship was covered by the policy. It is obvious that in that case there was not the intervention of any new cause. The hole occasioned by the collision was the cause of the loss. The fact that ineffectual attempts had been made to stop the hole, and that the plug came out, did not introduce any new element of causation. We have had a good deal of discussion as to the decision in *Hamilton Fraser & Co.* v. *Pandorf & Co.* (2), a case in which the damage was caused by rats gnawing a hole in a pipe, through which sea water entered and damaged the cargo of rice. There was an exception in the charterparty and bill of lading of dangers and accidents of the seas, and it was decided that the shipowners were not liable. For the clear understanding of that case it is desirable to call attention to a fact which was pointed out by Lord Dunedin in the course of the argument of the present case, and which appears

(1) [1894] 2 Q. B. 548. (2) 12 App. Cas. 518.

in the case for the appellants (Hamilton, Fraser & Co.) and the evidence there referred to. The hole was in a supply pipe communicating with the sea below the water-line, through which sea water was pumped up into a bath, and the hole made by the rats during the voyage was at a point in the pipe above the water-line when the vessel was fully loaded, but permitted the water to flow into the vessel when she rolled in the course of her voyage.

I do not think that any observations are necessary upon the other cases to which our attention was called.

In my opinion the appeal fails, and should be dismissed with costs.

VISCOUNT HALDANE. (1) My Lords, many authorities were cited at the Bar in the course of the arguments in this appeal. But I do not think that the law applicable is obscure. The real question turns out to be one of fact. The insurance included among the perils which it covered those of the seas, but from these were expressly excluded all consequences of hostilities or warlike operations.

The ship insured, the *Ikaria*, was bound to Havre, and when about twenty-five miles from that port on Saturday, January 30, 1915, was struck by a torpedo from a German submarine. The impact was on the port side, and the explosion tore a large hole there, 3·15 metres wide and 2·6 metres high, 4 feet below the water-line. A column of water which was thrown up burst out the bulwarks on the port side, No. 1 hold was filled with sea water, the fore peak was similarly about half filled, and some water penetrated into No. 2 hold. The vessel at once began to settle by the head and the crew took to the boats. But the steamer did not sink, although much down by the head, and they returned, and, with the aid of a tug and a mine-sweeper and her own steam, she reached Havre. She was then 17 feet down by the head, her draught being 32 feet forward and 15 feet aft, while before she was torpedoed her draught had been 23 feet 6 inches forward and 23 feet 9 inches aft. The result of the increased draught forward was that she could not enter the inner harbour at Havre or the dry dock, and she was berthed in the outer harbour at the Quai d'Escale. This was a berth used for

(1) Read by Lord Dunedin.

H. L. (E.) 1918

LEYLAND SHIPPING COMPANY v. NORWICH UNION FIRE INSURANCE SOCIETY.

Viscount Haldane.

military, and particularly for British Red Cross, purposes, and the only reason for allowing the steamer to go there was to save her if possible. Had she remained out at sea she would have sunk. The next morning, on January 31, 1915, an effort was made to pump the vessel and to lighten her cargo. But the wind rose and a swell ensued, and the *Ikaria* began to bump and the dislocation to increase. The port authorities therefore, fearing that she would sink and block the quay, ordered her to be removed, and either to be taken right outside the harbour and beached or to be moored alongside a breakwater called the Batardeau. The latter alternative being chosen, she was moored alongside the breakwater. But the bottom there was uneven and the water was only 30 feet deep, while the head of the steamer was drawing 32 feet, and could not be prevented from taking ground. This the ship did, and finally sank by the head as the tide rose on Tuesday, February 2, only part of the cargo being salved.

The learned judge who tried the case, Rowlatt J., found the facts broadly as I have stated them, and that the bulkhead between the holds No. 1 and No. 2 had been seriously disrupted by the explosion. He thought that if the *Ikaria* could have stayed at the Quai d'Escale she might have been saved. But she could not stay there, and partly because of the weakness of the bulkhead and partly because of the grounding at the Batardeau she sank. He came to the conclusion on the facts as proved before him that " it was not made out if she had been a sound ship and had not met this torpedo, and had suffered the same grounding in the same trim at the same spot, that she would have suffered these injuries." In his view the grounding was not a new thing supervening which caused damage. The being moored as she was to the Batardeau merely thwarted the attempt to save the ship. The loss was therefore caused by the explosion itself.

The Court of Appeal took substantially the same view of the facts as Rowlatt J., and the findings of fact were therefore concurrent. Swinfen Eady L.J. was of opinion that it could make no difference to the conclusion that the loss of the ship was the direct consequence of the explosion of the torpedo that " two or three days were spent in abortive and unavailing efforts to save her. She was in imminent risk of sinking from the moment of being injured." Bankes L.J.

took the same view. "You do not reach a place of safety unless you are allowed to remain there a sufficient time to ensure safety." Scrutton L.J. did not differ from the finding of fact in the words I have quoted from Rowlatt J., but thought that it might be held that the sinking did not necessarily follow from the explosion as described if, with fine weather and a stay in the first berth, the loss would have been averted, and that this would have been enough to make a general peril of the sea, and not the explosion, the proxima causa within the meaning of the policy. But he considered himself bound to follow a previous decision of the Court of Appeal of the correctness of which he intimated doubt. He thought that *Reischer* v. *Borwick* (1) had established that, on the facts proved, the *Ikaria* must be held to have been sunk as the immediate consequence of the explosion. This inference he could not, in his opinion, refuse to draw in view of what was held in *Reischer* v. *Borwick* (1), but he thought it inconsistent with what he considered ought to follow from the general principles affirmed by this House in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2)

My Lords, I cannot find any such inconsistency between these two authorities as Scrutton L.J. thought to exist. In *Reischer* v. *Borwick* (1) there was a policy which covered collision with any object but excluded perils of the sea. The ship struck a snag which made a hole in her. She was then anchored and the leak was temporarily plugged, and she was towed towards the nearest dock for repair. But while she was in course of being towed the water burst through the hole and she had to be run aground and abandoned. The Court of Appeal held that the causa proxima of the damage was in reality the collision with the snag. In the words of Davey L.J. (3), it was "the inrush of the water through the hole in the condenser. What made the hole in the condenser? The collision made the hole in the condenser, and the broken condenser was a continuing source of risk and danger. The failure of the attempt to mitigate or stop the damage arising from the breach of the condenser cannot . . . . justly be described as the cause of the ultimate damage." My Lords, these words express what the common sense of mankind would assert in such a case. They are in no way inconsistent with

(1) [1894] 2 Q. B. 548. (2) 12 App. Cas. 518.
(3) [1894] 2 Q. B. 553.

H. L. (E.) 1918

LEYLAND SHIPPING COMPANY v. NORWICH UNION FIRE INSURANCE SOCIETY.

Viscount Haldane.

what was laid down in *Hamilton* v. *Pandorf*. (1) There rice was shipped under a charterparty, and bills of lading which excepted "dangers and accidents of the sea." During the voyage rats gnawed a hole in a pipe in the ship and sea water entered through it and damaged the rice. There was no negligence. It was held that the damage was within the exception, because whether it was rats that had made the hole, or whether, for example, a porthole had got open, the sea was in such a case not the less the immediate cause of the damage. In *Reischer* v. *Borwick* (2), although perils of the sea in general were excluded, a particular kind of such peril, collision, was expressly included. In *Hamilton* v. *Pandorf* (1) all dangers and accidents of the sea were excluded, and the inrush of water which arose from the gnawing of the pipe by the rats during the voyage was held to be excluded along with them as being a case falling within the class so defined.

My Lords, in the case before us all consequences of hostilities or warlike operations are excluded from the perils of the seas insured against. There is nothing in *Hamilton* v. *Pandorf* (1), or in the now familiar rule, that the immediate cause of the accident is what is taken to have been so in contemplation of the parties to a policy of marine insurance, which prevents the explosion from being taken to be in law, what it was in fact, the cause of the loss. The fact that attempts were made to obviate the natural consequences of the injury inflicted by the torpedo does not introduce any break in the direct relation between the cause and its effect which culminated in the damage sustained. I am therefore of opinion that the appeal must fail.

LORD DUNEDIN. My Lords, we have had a large citation of authority in this case, and much discussion on what is the true meaning of causa proxima. Yet I think the case turns on a pure question of fact to be determined by common-sense principles What was the cause of the loss of the ship? I do not think the ordinary man would have any difficulty in answering she was lost because she was torpedoed. I shall state my view very briefly on the facts, but before I do so I wish to say a word as to the policy. It seems to me that the possibility of the prolonged and ingenious

(1) 12 App. Cas. 518. (2) [1894] 2 Q. B. 548.

argument we have had in the case really flows from the form of the instrument and the opportunity it gives for looking at one thing from different points of view. The policy, in time-honoured form, first specifies as the perils and adventures which the underwriters are content to bear, perils of the sea in general terms; and then comes a detailed enumeration of certain perils. Now when the f.c.s. clause is added certain enumerated perils are cut out of the original insurance. When it is a case of one of the perils acting solely and sufficiently, such as for instance the peril of capture, no difficulty can arise. But there are certain perils which, so to speak, pray in aid the perils of the sea. A man-of-war fires a shot and hits the ship. If it only hits the top of the bulwark or a bit of the rigging there will be at the worst only a partial average. But if the shot strikes between wind and water and makes a hole, the vessel will be sunk, and the reason of its sinking will not be the mere existence of the hole, but the fact that the sea comes in through the hole, and the vessel founders. Overwhelming by the sea is a peril of the sea in a general sense, and accordingly in such a case, if either the body of the policy or the exception were looked at alone, the peril incurred could be held to fall under either. In the exception it would fall under it, because the sinking was the direct result of the action of the man-of-war. In the body of the policy it would be immaterial whether it fell within the general expression "perils of the sea" or the particular expression "man-of-war." But the moment that the two clauses have to be construed together it becomes vital to determine under which expression it falls. The solution will always lie in settling as a question of fact which of the two causes was what I will venture to call (though I shrink from the multiplication of epithets) the dominant cause of the two. In other words, you seek for the causa proxima, if it is well understood that the question of which is proxima is not solved by the mere point of order in time.

In the illustration I have given no one would have the slightest doubt the dominant cause was the shot of the man-of-war. I would also like to remark that this class of competition between causes can only truly arise when you have to deal with an exception. I say this because of the great stress that was laid by the appellants'

H. L. (E.) 1918

LEYLAND SHIPPING COMPANY v. NORWICH UNION FIRE INSURANCE SOCIETY.

Lord Dunedin.

counsel on the case of *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1) There it was held that damage by sea water which came in through a hole in a bath supply pipe was a peril of the sea, though the sea would not have been admitted if a rat had not gnawed a hole in the pipe. It was the sea that spoiled the cargo, and the precise way in which it was admitted (putting aside negligence of the ship's servants, which, as it was a bill of lading and not an insurance case, would have altered the question) was immaterial, whether it was owing to rat, iceberg, sunken rock, or swordfish. If in that case there had been an exception of all dangers brought about by rats, then the decision, I take it, would have been different. I say all dangers brought about by rats, for if the exception had been merely against rats, then as a question of construction it might have been held that that only meant to refer to the predatory habits of the rat, and not to anything so exceptional as what occurred. I am not, therefore, pressed by the difficulty which was felt by Scrutton L.J. in reconciling *Reischer's Case* (2) with *Hamilton's Case.* (1)

I now turn to the facts in the case. I concur with what has been said by the Lord Chancellor, and do not think it necessary to repeat. Summarized, the facts seem to me to come to this. After the torpedo struck her she was a doomed ship, unless she could get into a real place of safety. She nearly got to a place of safety, but never quite did so. What happened was in the circumstances the natural sequel to the injury by the torpedo. Water was admitted, at first only so far. She was down by the head, and therefore took the ground. The combined action of taking the ground and rising and falling with the tide, together with the swelling of the cargo, which had been wetted, strained her and broke her up, so that she became a total wreck. There is no better or truer account than that given by the master himself, soon after the event, in his letter of February 10, when he writes to his owners and says: "There is no one here now who has the least knowledge of making or fitting shields over fractures in ships' bottoms, and even had there been it is very doubtful whether shields large enough to cover the two large fractures made by the torpedo could have been constructed and fitted in time to save her from sinking. It seems evident from the very sudden way in which the forward end of

(1) 12 App. Cas. 518. (2) [1894] 2 Q. B. 548.

the vessel crumpled up that her structure was so weakened by the terrific force of the explosion that there was no strength left to resist the additional strain imposed on her, firstly, by the great weight of water against the bulkheads, and afterwards by the bursting strain of the cargo as it swelled in the holds."

I agree with the judgment of the Court of Appeal.

LORD ATKINSON. My Lords, I concur.

The appellants by a policy of marine insurance dated June 8, 1914, insured their steamship *Ikaria* against loss by perils of the sea. The policy contained a warranty clause which ran as follows: "Warranted free of capture seizure and detention and the consequences thereof or of any attempt thereat piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war."

According to the decision in *Ionides* v. *Universal Marine Insurance Co.* (1), this clause is to be construed as if the assured had reinsured against the events enumerated, and the word "consequences" must accordingly be taken to mean proximate or direct or immediate consequences only: see Willes J., approved of in *Andersen* v. *Marten.* (2) The policy, therefore, effects an insurance against perils of the sea other than those which are the direct and immediate consequence of hostile and warlike operations. The rule that in marine insurance policies the proximate, not the remote, causes are to be regarded is supposed to be based upon the intention of the contracting parties, to be gathered from the language of the contract itself, taken in connection with the surrounding circumstances; but there is such a tendency in argument to treat concurrent causes as preceding and succeeding causes, the latter proximate, the former remote, and to split up complex causes into their components and establish a sequence between them, that it is well always to bear in mind the warning given by Lindley L.J. in *Reischer* v. *Borwick* (3), that this rule of maritime insurance must be applied with good sense to give effect to, and not to defeat the intention of the contracting parties.

I asked Mr. Leslie Scott, when opening the appeal, if the torpedo

(1) 14 C. B. (N.S.) 259, 286, 289, 290.
(2) [1908] A. C. 334, 340.
(3) [1894] 2 Q. B. 548, 550.

H. L. (E.) 1918

LEYLAND SHIPPING COMPANY v. NORWICH UNION FIRE INSURANCE SOCIETY.

Lord Atkinson.

had opened such a rent in the *Ikaria's* side that the sea water rushed into her hold and sank her, could he recover on the policy sued on for a loss by perils of the sea ? Of course he replied in the negative. Then the sea peril would be the direct and immediate consequence of hostilities or warlike operations. I then asked him if the captain of a torpedoed ship, having formed a judgment, found to be reasonable in the circumstances, that his ship would, owing to her injuries, sink if kept in deep water, beached her to prevent her total loss, would the owner be entitled to recover on such a policy as the present ? And I understood him also to reply in the negative. I do not think the liability would be in the slightest degree altered if the ship should, when beached, settle down upon a rock of the existence of which the captain was not aware and had broken her back.

On the whole of the evidence it is, I think, absolutely clear that the vessel was so damaged by the torpedo that she could not keep the sea, or at all events that there was no reasonable probability of her being able to do so. Well, the captain, having got a choice he was under the circumstances bound to take, of beaching her outside the harbour, or anchoring her inside the breakwater in order to continue the salvage operations he had already commenced at the Quai d'Escale, brought her to the latter place. The ship's taking the ground in her new anchorage was an obvious and necessary result, as she was drawing 32 feet 6 inches forward, and the depth of water at the anchorage was only 30 feet at low tide. The risk of her grounding forward was deliberately but reasonably run, and I really cannot see the difference in principle between taking this risk and taking the risk of beaching her completely. It is quite true that in the efforts to salve the cargo and the ship her injuries may have been aggravated, but none the less, in my opinion, was the loss the direct and immediate consequence of the torpedoing. And I do not think any of the authorities cited are inconsistent with this conclusion.

The appeal in my opinion fails, and should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, on January 30, 1915, the *Ikaria*, bound from South American ports to Havre with a general cargo, was, about twenty-five miles north-west of Havre,

struck by a torpedo fired from a German submarine. She sustained severe injuries; but, assisted by a tug and a mine-sweeper, she succeeded in making the port of Havre. She was then drawing 32 feet forward, the injuries and consequent filling being in the fore part of the vessel: and her depth was too great to permit her entry into the inner harbour. In the outer harbour she was berthed for a time at the Quai d'Escale. There being, however, a fear that she might sink there and so interrupt the traffic of the Red Cross organization at that quay, she was taken to another portion of the harbour. At the latter point, notwithstanding all efforts by pumping and otherwise, she bumped, broke her back, and sank on the afternoon of February 2.

It is admitted that from the time of her being torpedoed everything was done to save her from the fatal effects of the collision, and that after she entered the harbour her officers were bound to obey the orders of the harbour-master. The weather was rough, but not severely so.

I see no reason whatever to doubt that this happened, as Captain Robertson, in his report of February 10, states. "It seems evident," says he, "from the very sudden way in which the forward end of the vessel crumpled up that her structure was so weakened by the terrific force of the explosion that there was no strength left to resist the additional strain imposed on her, firstly, by the great weight of water against the bulkheads, and afterwards by the bursting strain of the cargo as it swelled in the holds."

To the perils of the sea against which she was insured under the policy founded on there was a warranty of exception—the words of the warranty being "free . . . . from all consequences of hostilities or warlike operations." The question in the appeal is whether the loss of the vessel was proximately caused by such hostilities or warlike operations. If so, the insurers stand free; if not, the insured can recover under the policy against perils of the sea.

I am of opinion that the loss was caused because the vessel was torpedoed, and that the warranted exception applies. If the case were not complicated, or supposed to be complicated by legal decisions, there would seem to be no answer to this view. Notwithstanding the conclusion arrived at by Scrutton L.J., I understand from his careful judgment that this would also be his opinion.

H. L. (E.)
1918
LEYLAND SHIPPING COMPANY v. NORWICH UNION FIRE INSURANCE SOCIETY.
Lord Shaw of Dunfermline.

My Lords, there was at one time an attempt to differentiate the meaning of the same contractual words as used in a policy of marine insurance from the meaning of the same expression as used in other maritime contracts ; but in two judgments of your Lordships' House in the year 1887 the practice was condemned. I refer to *The Xantho* (1), in which the term under examination was " the perils of the sea." In that case Lord Macnaghten dealt with the " error of the Court of Appeal " thus : " They start with the assumption that the same words have different meanings when used in policies of insurance and when used in bills of lading. For that assumption there is not, I venture to think, any foundation." In the *Pandorf Case* (2) the exceptions being considered was " dangers and accidents of the sea " ; and Lord Watson observed : " Your Lordships have now disapproved of the novel doctrine that, in a contract of sea carriage, a meaning must be attached to the expression ' dangers and accidents of the sea ' different from that which it bears in a contract insuring cargo against sea risks ; that, in the case of a charterparty or bill of lading, the Court ought to look to what has been termed the remote as distinguished from the proximate cause of damage, whereas in the case of a policy the proximate cause can alone be regarded." It would rather appear accordingly that this doctrine of proximate cause will be considered in the same light whether in contracts of marine insurance or in contracts of sea carriage, and good sense suggests that it should be so.

By the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 55, the expression has become statutory and " the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against." In this way the discussion of the scope of proxima causa is very relevant and its ascertainment vital.

In my opinion, my Lords, too much is made of refinements upon this subject. The doctrine of cause has been, since the time of Aristotle and the famous category of material, formal, efficient, and final causes, one involving the subtlest of distinctions. The doctrine applied in these to existences rather than to occurrences. But the idea of the cause of an occurrence or the production of an event or the bringing about of a result is an idea perfectly familiar to the

(1) 12 App. Cas. 503, 517. (2) 12 App. Cas. 518, 525.

mind and to the law, and it is in connection with that that the notion of proxima causa is introduced. Of this, my Lords, I will venture to remark that one must be careful not to lay the accent upon the word "proximate" in such a sense as to lose sight of or destroy altogether the idea of cause itself. The true and the overruling principle is to look at a contract as a whole and to ascertain what the parties to it really meant. What was it which brought about the loss, the event, the calamity, the accident? And this not in an artificial sense, but in that real sense which parties to a contract must have had in their minds when they spoke of cause at all.

To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

What does "proximate" here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.

I illustrate that by the present case. Did the vessel perish because she was torpedoed or by a peril of the sea apart from that? It is replied: "She perished by a peril of the sea because sea water entered the gash in her side which the torpedo made." Certainly the entry of sea water was a peril of the sea, and certainly that entry of sea water was proximate in time to the sinking. But how could there be any exception in the case of a vessel lost in harbour or at sea to a loss by perils of the sea if the proximate cause in the sense of nearness in time to the result were the thing

H. L. (E.) 1918

LEYLAND SHIPPING COMPANY v. NORWICH UNION FIRE INSURANCE SOCIETY.

Lord Shaw of Dunfermline.

to be looked to? It is hardly possible for the mind to figure any thing which would interfere with or be an exception to a cause so proximate as the entry of sea water into or over the hull as the vessel sinks in the waves. The result of this is that the consideration of the exception of the consequences of hostilities, or indeed any other exception so far as I can at present figure, if that consideration be limited to a cause proximate in time, destroys the exception altogether. It might as well never have been written. In my opinion, accordingly, proximate cause is an expression referring to the efficiency as an operating factor upon the result. Where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency. Fortunately this much would appear to be in accordance with the principles of a plain business transaction, and it is not at all foreign to the law.

In *Reischer's Case* (1) Lord Lindley (then Lord Justice), speaking of causa proxima says, "this rule is based on the intention of the parties as expressed in the contract into which they have entered; but the rule must be applied with good sense, so as to give effect to, and not to defeat, those intentions." A second example, which I here give, shows that although insurers may limit their liability expressly to causa proxima and with elaborate astuteness may enumerate other facts and circumstances which would not be considered direct or proximate causes, the same result will follow, namely, that the proximate cause will be found to be, to use the words employed by Channell J. in *Etherington's Case* (2), "the real effective cause of what has happened." "You must," said he, "have something that may be called a new intervening cause, in order to prevent the existing cause which is operating to produce a well-known result from being said to be the real effective cause of what has happened." Vaughan Williams L.J. thought this view of Channell J. was quite right. So do I.

To apply this to the present case. In my opinion the real efficient cause of the sinking of this vessel was that she was torpedoed. Where an injury is received by a vessel, it may be fatal or it may be cured: it has to be dealt with. In so dealing with it there may,

(1) [1894] 2 Q. B. 548, 550. (2) [1909] 1 K. B. 591, 598.

it is true, be attendant circumstances which may aggravate or possibly precipitate the result, but which are incidents flowing from the injury, or receive from it an operative and disastrous power. The vessel, in short, is all the time in the grip of the casualty. The true efficient cause never loses its hold. The result is produced, a result attributable in common language to the casualty as a cause, and this result, proximate as well as continuous in its efficiency, properly meets, whether under contract or under the statute, the language of the expression "proximately caused."

I beg to express, my Lords, my sense of indebtedness to Mr. Wright for the brief but most cogent argument with which he assisted the House.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, January 31, 1918.

Solicitors for appellants: *Alfred Bright & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for respondents: *William A. Crump & Son.*

[HOUSE OF LORDS.]

H. L. (I.)* YOURELL AND ANOTHER . . . . . APPELLANTS;

1917

AND

Oct. 19. HIBERNIAN BANK, LIMITED . . . . . RESPONDENTS.

1918

Feb. 5.

Mortgage—Mortgagee's Action—Form of Accounts—Banker and Customer—Current Account—Security for Advances by Bank on Overdraft and otherwise — Appointment of Receiver — Principal and Interest — Appropriation of Mortgage Moneys to Payment of Principal—Lien for Salvage Payments—Conveyancing and Law of Property Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 19; *s.* 24, *sub-s.* 8.

In 1899 a customer of a bank mortgaged certain lands to the ank to secure the balance for the time being owing on foot of overdrafts, bills of exchange, promissory notes, credits, advances, interest, commission, discount, and premiums on policies of insurance. The security was to bear interest computed from day to day at the current bank rate up to 6 per cent. The deed contained a proviso that no greater principal sum than 5700*l.* should be recoverable on the security. In keeping the mortgagor's current account, which was continued from the date of the mortgage until after action brought and was approved each half-year by the mortgagor, the interest was charged from day to day with half-yearly rests, so that the interest was capitalized every half-year. In 1903 the mortgagor owed to the bank on his current account and on promissory notes a sum in excess of 5700*l.*, and, on his failure to reduce his overdraft, the bank refused to honour his cheques, except certain cheques drawn by him for the preservation of the subject-matter of the security, and for this purpose the bank also made certain payments, which they debited to the overdrawn account. In December, 1904, the bank appointed a receiver of the mortgaged premises under the Conveyancing and Law of Property Act, 1881. The bank paid to the credit of the mortgagor's current account all sums received by them from the receiver out of rents and profits and also the proceeds of sale of part of the mortgage security sold by them in exercise of their powers under the mortgage, with the result that in this way more than 5000*l.* was appropriated to the payment of principal. In an action to enforce their security the bank claimed that an account should be taken as between mortgagor and mortgagee and that the current account should be treated as closed as from the date of the appointment of the receiver:—

Held—(1.) that the current account was not closed by the appointment of the receiver, but continued as an operative account

* *Present:* LORD FINLAY L.C., LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD WRENBURY.

to which the provisions of the mortgage deed applied; (2.) that the bank had no lien for salvage in respect of the moneys paid to preserve the subject-matter of the security, inasmuch as those payments were not made by the bank, but by the mortgagor out of moneys advanced to him by the bank; (3.) that, as regards the surplus on the receiver's account, the application of the moneys in reduction of the interest in the manner prescribed by the Conveyancing and Law of Property Act, 1881, was capable of alteration by the consent of the parties interested, and that such consent ought to be inferred from the facts; and that it was therefore not competent to the bank to object to the appropriation of these moneys to the payment of principal as illegal.

Decision of the Court of Appeal in Ireland [1916] 1 I. R. 312 reversed.

APPEAL from an order of the Court of Appeal in Ireland in so far as it reversed a judgment of O'Connor M.R. (1)

The action was brought in December, 1913, by the respondent bank against William J. Yourell, Denis Yourell, Francis Joseph Yourell, Frances Yourell, and the appellants Elizabeth Yourell and Margaret McDermott, to have an account taken of the money due to the bank upon the security of a mortgage dated November 20, 1899, and made between the defendants and the bank, and for the realization of the moneys so due by a sale of the mortgaged premises, or by a receiver, or by both, as the Court might direct.

The mortgage was to secure the balance which should from time to time be due to the bank for advances made by them as bankers on overdraft on current account, on bills, and otherwise to the defendant William J. Yourell, who was the principal debtor. The other defendants, who were the brothers, mother, and sisters of W. J. Yourell, were interested in varying degrees in the mortgaged property and joined in the deed in respect of their several interests.

The substantial question at issue was as to the form in which the account claimed by the bank should be taken. The bank contended that the current account of W. J. Yourell ceased to be operative on December 17, 1904, the date of the appointment by the bank under the powers of the Conveyancing and Law of Property Act, 1881, of a receiver over the mortgaged premises, and that the account should be taken as an account between mortgagor and mortgagee in the ordinary form.

(1) [1916] 1 I. R. 312.

H. L. (I.)
1917
YOURELL
v.
HIBERNIAN
BANK.

The facts are fully stated in the judgment of the Lord Chancellor and are sufficiently summarised in the head-note for the purposes of the argument.

The Master of the Rolls held (1.) that the bank were bound by the manner in which they had continued the current account of W. J. Yourell after the date of the appointment of the receiver; (2.) that the sums paid by the bank for the preservation of their security had in fact been liquidated by their debiting the same to the current account of W. J. Yourell; (3.) that all sums received by the bank on foot of the sale of part of the mortgaged premises and from payments made by the receiver from time to time out of the rents and profits of the mortgaged premises had been credited by the bank against principal moneys secured by their mortgage, and that all such sums must be taken as payments on account of the principal sum of 5700*l.* secured by the mortgage; and he gave effect to these opinions by two declarations.

The Court of Appeal in Ireland by a majority (O'Brien L.C. and Molony L.J., Cherry C.J. dissenting) discharged so much of the judgment of the Master of the Rolls as contained these declarations and ordered that the account directed by him should be taken on the basis that the current account of W. J. Yourell was closed on the date of the appointment of the receiver.

1917. July 2, 3. *S. L. Brown, K.C.*, and *Carrigan, K.C.* (with them *F. J. MacCormack*) (all of the Irish Bar), for the appellants. This is a mortgage securing the balance from time to time due by the customer on all the accounts which the bank has against the customer, and so long as the relation of banker and customer exists those are the accounts which govern the transaction and show the amount for the time being due on the mortgage. If the banking account is closed the mortgage thereupon becomes a mortgage for a fixed amount, which is the amount then appearing to be due on foot of the banking account, and as from that date the account becomes an ordinary mortgage account. But in this case the account was not closed before action brought. There is no ground for saying that the appointment of the receiver operated as a closing of the account. The bank might have closed the account, but they elected to keep it open for their own purposes, and the

debtor acquiesced in that course. The effect of the mode in which the current account was kept was that every lodgment to the credit of that account went in reduction of the limit recoverable for principal under the mortgage: *Johnson* v. *Bourne*. (1) The bank are not entitled, in the absence of any mistake, to reopen the current account either generally, or with reference to the salvage payments, or to the moneys received from the receiver.

As regards the latter moneys, the mode of application prescribed by the Conveyancing and Law of Property Act, 1881, s. 24, sub-s. 8, namely, the keeping down of the interest on the mortgage, was departed from by the orders of the bank, who practically took control of the receiver. The bank, having appropriated these payments to principal instead of interest for more than ten years and communicated the same to the customer, cannot now repudiate that appropriation upon the ground that they have kept their accounts on a wrong basis and that it was illegal to apply the moneys in this way. At any rate, this argument cannot apply to the proceeds of sale, which the receiver received, not as receiver, but as auctioneer.

As regards the claim for salvage, in Ireland if a mortgagee, though not in possession, pays money to preserve his security he has an equitable lien on the property for these expenses with interest at 4 per cent.: see *In re Leslie* (2); but here the bank cannot claim as salvors, because they have elected to take the personal liability of the mortgagor, thereby getting 6 per cent. instead of 4 per cent., and they cannot go back upon their appropriation.

The excess of the customer's indebtedness over the 5700*l.* in 1903 was in part attributable to a sum of 3600*l.* due by him to the bank upon promissory notes. This sum, which is still owing, was not included in the current account, and the bank claim arrears of interest upon it. This point was not taken before the Master of the Rolls. But where the principal is limited the interest recoverable on the mortgage is limited to the interest on that principal (see the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 88, sub-s. 1), and substantially the whole of that principal has been paid off.

Serjeant Matheson, K.C., and *Herbert Wilson, K.C.* (with them

(1) (1843) 2 Y. & C. Ch. 268, 277. (2) (1883) 23 Ch. D. 552, 560.

H. L. (I.) 1917 YOURELL v. HIBERNIAN BANK.

R. G. L. Leonard) (all of the Irish Bar), for the respondents. The appointment of the receiver under the Conveyancing and Law of Property Act, 1881, by the deed of December 17, 1904, operated as a closing of the current account, and thereupon the mortgage was converted into a mortgage for a fixed amount. The deed treats this as a mortgage for a fixed sum of 5700*l.* and then invokes the aid of the Act in keeping down the interest in the terms of the section. The receiver is appointed "to the intent that he shall apply all moneys received by him in the manner directed by sub-s. 8 of s. 24 of the said Act." The effect of the deed was to crystallize what was done on all the accounts. The mortgage account and the current account are two separate accounts and proceed upon different principles: *Mosse* v. *Salt* (1); *Daniell* v. *Sinclair* (2); *Economic Life Assurance Society* v. *Usborne*. (3) The account kept after the appointment of the receiver was simply an account against the mortgagor personally; it contained a number of items which were not relevant to the mortgage at all.

As regards the rents and profits received from the receiver, the respondents are entitled to rely upon his misapplication of those moneys. The Act says that the receiver, though appointed by the mortgagee, shall be the agent of the mortgagor, and provides for the application of the moneys in his hands in a prescribed mode. The receiver is appointed over the income of what may be a common security, and he owes duties to the puisne mortgagees. The mortgagee cannot assume the powers of the receiver and violate the statute by applying the rents and profits in payment of principal. He availed himself of the statutory power and the terms of that power must be followed. There can be no appropriation by the mortgagee contrary to the terms of the statute, and therefore the respondents are not bound by these alleged appropriations.

As regards the claim for salvage, the payments were made out of the respondents' moneys, and they are therefore entitled to a lien for the amount of salvage in priority to all other charges. [They also referred to *Crosskill* v. *Bower* (4) and *Thompson* v. *Hudson*. (5)]

(1) (1863) 32 Beav. 269.
(2) (1881) 6 App. Cas. 181.
(3) [1902] A. C. 147.
(4) (1863) 32 Beav. 86.
(5) (1870) L. R. 10 Eq. 497.

The House took time for consideration.

Oct. 19. LORD FINLAY L.C. My Lords, the question in this appeal is as to the principle on which the account should be taken for the purpose of ascertaining the amount chargeable under a mortgage in favour of the respondent bank upon the interest of the appellants in certain lands therein mentioned. The action was brought by the respondent bank on December 23, 1913, to enforce their charge under the mortgage. The only question is as to the amount.

The mortgage is dated November 20, 1899, and was executed in favour of the respondent bank as mortgagees by William J. Yourell, described as the mortgagor, of the first part, his brothers Denis and Francis Yourell of the second and third parts respectively, his mother Frances Yourell of the fourth part, and his sisters Mary Elizabeth Yourell and Margaret McDermott, the present appellants, of the fifth and sixth parts. The principal debtor was William J. Yourell, and the mortgage deed recited that he applied to the respondent bank for further advances and that his brothers had agreed to join in the security, as also his mother and sisters in respect of their interest in the lands to be charged.

The mortgage contains the following covenant by the mortgagor: "Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the sum of 5700*l.* now due and owing by the mortgagor to the bank, as the mortgagor hereby acknowledges, he the said mortgagor hereby covenants with the bank to pay to them on the 20th day of February next the sum of 5700*l.* with interest for the same in the meantime computed from day to day at the current rate of the bank during such period as such current rate shall not exceed 6*l.* per cent. per annum and during all other times at the said rate of 6*l.* per cent. per annum, and also to pay to the bank on demand the balance which on any account or accounts present or future between the mortgagor and the bank either alone or jointly with any other person or persons shall for the time being be owing by the mortgagor to the bank on foot of overdrafts, bills of exchange, promissory notes, loans, credits, advances, interest, commission, discount, premiums on policies of assurance, costs, customary charges or otherwise; and

H. L. (I.) 1917 — YOURELL v. HIBERNIAN BANK. — Lord Finlay L.C.

whether the mortgagor shall be liable therefor as principal or surety, and also if the said sum of 5700*l.* or any part thereof shall remain unpaid after the said 20th day of May next, or if such balance as aforesaid or any part thereof shall remain unpaid as thereinbefore provided, then so long as money shall remain due to the bank on foot of this security and notwithstanding the recovery of any judgment for the same to pay to the bank by equal half-yearly payments on the 20th day of May and 20th day of November in each year interest computed from day to day at the rate aforesaid upon the sum or sums for the time being unpaid."

By the clauses immediately following this covenant the mortgagor and the other parties to the deed charged the lands in respect of their interest, and the proviso for redemption was in the following terms :—

"And it is hereby provided and agreed that if the mortgagor or his heirs, executors, administrators or assigns shall on the 20th day of February next pay unto the bank or the persons deriving title under them the said sum of 5700*l.* with interest thereon in the meantime at the rate aforesaid, and shall on demand by the bank or by their secretary for the time being, or by the persons deriving title under them, made to the mortgagor or the persons deriving title under him, or left upon any portion of the said premises or without any demand being made pay to the bank or the persons deriving title under them or to one of the cashiers of the said bank on behalf of the said bank the balance which at the time of such demand shall be owing by the mortgagor to the bank pursuant to the covenant in that behalf hereinbefore contained, then the said respective premises shall at any time thereafter, upon the request and at the cost of the mortgagor or other persons respectively entitled thereto, be duly reconveyed or released by the bank or by the persons deriving title under them to him or them, or as he or they shall direct. And it is hereby also agreed and declared that if the said sum of 5700*l.* or any part thereof shall remain unpaid after the said 20th day of February next, or if such balance as aforesaid or any part thereof shall remain unpaid after such demand as hereinbefore provided, then notwithstanding section 20 of the Conveyancing and Law of Property Act, 1881, the bank shall have and shall be entitled at any time to exercise

and put in force as against all the lands hereby mortgaged or charged all the powers and remedies conferred by that Act on mortgagees in like manner as if the said section 20 had not been contained in that Act.

"And it is hereby also agreed and declared that no greater principal sum than 5700*l.* shall be recoverable on the security of these presents, but that to that extent the same shall be a continuing security to the bank as well for money due on current securities and current accounts as for money actually payable and that same shall not be prejudiced by the settlement of any account or by any collateral or other security being taken for any of the moneys intended to be secured hereby even if same shall not be payable until a future time and shall be taken without the consent or notwithstanding the prohibition of the mortgagor in respect of moneys to which the mortgagor is or shall be liable as a surety only and further that these presents shall not operate as a merger or defeasance of any prior charge or estate legal or equitable of the bank upon or in the premises herein comprised or any part thereof, in case and so far as the bank shall at any time or times thereafter think fit to avail themselves of such prior charge or estate for any purpose whatsoever."

The effect of this deed was that the lands were charged with the payment of any balance which might be due from William J. Yourell to the bank on his account for overdrafts, bills of exchange, &c.

The question on which the case turns is whether the bank are bound by the account which was kept in their books and from time to time communicated by them to the mortgagor, or whether they are entitled to have this account reopened and a fresh account taken as between mortgagee and mortgagor as from December 17, 1904.

The Master of the Rolls, before whom the case came in the first instance, adopted the former of these views, but the Court of Appeal (the Lord Chief Justice dissenting) reversed his decision and held that the respondent bank was entitled to treat the account as closed on December 17, 1904, and to have a fresh account taken as between mortgagor and mortgagee.

In my opinion the view taken by the majority of the Court of

H. L. (I.) 1917 — YOURELL v. HIBERNIAN BANK. — Lord Finlay L.C.

Appeal is erroneous. The mortgage was to secure the balance of the account between the mortgagor and the bank, and the amount must be ascertained on the footing of the account as in fact kept.

This appeal is brought by the sisters of the mortgagor only, the sole question being as to the liability of their interest in the land under their charge.

In June, 1903, the mortgagor owed on his account 2949*l.*, and a further sum of 3600*l.* on promissory notes. He failed to comply with the demand of the bank to reduce the debt balance by 800*l.* at least, and on December 17, 1904, the bank by deed appointed a receiver under s. 19 of the Conveyancing and Law of Property Act, 1881. The bank also refused from that time to honour any further cheques. But the account was not closed, and there was paid into it from time to time any surplus on the receiver's account and any sums received from the sale of land. Any such payments to the credit of the current account would go in reduction of principal. This is not disputed, but it is said that the account was open in form only and cannot be treated as a "living" account for the purpose of ascertaining the amount due under the mortgage. I am unable to adopt this view for the reasons given by the Lord Chief Justice in the following passages from his dissenting judgment (1) :—

"Now, on examining the account, a copy of which has been furnished to us, I find that it was regularly kept as a current account by the bank down to the year 1915, and that in every half-year after 1904 there were entries both on the debtor and creditor side of the account. Most of the items entered were connected with the lands included in the mortgage of 1899, but there were others also, as, for instance, payments each half-year of premiums on an insurance upon the life of Wm. J. Yourell, which had no connexion with the mortgage at all. So that it would be impossible for the bank to contend that the account was in some way transformed from a current account into a mortgage account.

"Not only was the account regularly kept by the bank as an ordinary current account, but details of it were regularly entered in the customer's pass book and furnished to him—not, I may

(1) [1916] 1 I. R. 325, 326, 327.

observe in passing, to the other mortgagors. At the end of each half-year Mr. Yourell was sent with his pass book a docket which he was asked to sign and return, stating that he had examined the pass book—that the account showing a debit balance against him was correct, and acknowledging that he owed that amount to the bank. This statement he regularly signed down to the year 1914. Yet we are asked to hold that this account, in which no error is shown to exist, does not in any way bind the bank, and that they may repudiate it altogether, and furnish a new account on an entirely different basis, when they find it to be to their financial advantage to do so.

"The correspondence, which is in evidence, between the general manager of the bank in Dublin and the local manager of the bank in Navan, between the years 1904 and 1913, all along treats this account as an ordinary open current account." And a little further on the Lord Chief Justice says: "It follows also, as a logical conclusion, if the account is taken to be an open current account down to the commencement of the action, that the payments into it of the balance of the receiver's accounts from year to year must be taken to be payments on a capital account, and in discharge of the principal sum secured by the mortgage. For the principal sum due upon the mortgage is the amount of the overdraft from time to time. Every payment, therefore, made into the current account must, pro tanto, reduce the amount due on the mortgage. It is said that the receiver was bound by section 24, sub-section 8, of the Conveyancing Act, 1881, to apply these moneys in discharge of interest, and that he could not legally appropriate them to the capital account. The answer to this is, that it was not the receiver, but the bank, that made the appropriation. At the time of the payments by the receiver there was a much larger sum due to the bank for interest on the bills, which at that time were not brought into the current account, and the receiver was therefore quite right to pay over the money to the bank. But the placing of it to the credit of the current account, instead of applying it to the payment of interest on the bills, was the act of the bank. The customer, Mr. Yourell, was regularly informed of this method of dealing, and approved of it by signing the half-yearly dockets. The bank, in my opinion,

H. L. (I.) 1917

YOURELL v. HIBERNIAN BANK.

Lord Finlay L.C.

ought not now to be allowed to repudiate it, having discovered that another arrangement would be more advantageous to them."

The fact that W. J. Yourell was not allowed to draw cheques upon the account as previously cannot outweigh the fact that it was kept and from time to time communicated to the mortgagor and assented to by him. This account was the account with the bank referred to in the mortgage as a measure of liability subject to the limit of the principal debt (the 5700*l.*). To hold otherwise would be to depart from the terms of the mortgage deed or to treat the respondents as having closed the account in December, 1904, instead of keeping it open as they did down to the commencement of the action.

It was strenuously contended for the respondents that any surplus on the receiver's account ought, according to s. 24 of the Conveyancing and Law of Property Act, 1881, to be applied in reduction of interest, and that its payment into the current account as against principal would be illegal. The plain answer to this contention is that what was done was done by the direction and with the concurrence of the respondent bank, and it is not open to them to complain of what was their own act.

In my opinion no case has been made for reopening this account. During a long series of years it was regularly communicated to the mortgagor and assented to by him, and there are no circumstances which would entitle any Court to set it aside. It must govern the amount due by the principal debtor and that for which the sureties are liable.

For the purpose of ascertaining the amount in the decree the account must be taken as it stands in the books of the bank. The order made by the Master of the Rolls should be restored with an alteration dealing with the interest in terms which have been prepared by my noble and learned friends Lord Parker and Lord Wrenbury, so that the order in its operative part will read as follows: "Accordingly this Court doth declare that no greater principal sum than 5700*l.* and no interest in excess of interest upon 5700*l.* or such less sum as shall have been or shall be for the time being recoverable on foot of the indenture of mortgage was recoverable on foot of the indenture of mortgage in the pleadings mentioned"; and so on, as in the order drawn up by the Master of the Rolls.

The appellants should have their costs in the Court of Appeal and in this House. The question of costs before the Master of the Rolls was reserved to be dealt with by him.

LORD ATKINSON. My Lords, I concur.

The facts have been fully stated. I shall only refer to them in so far as is necessary to make intelligible what I am about to say. If the true nature and extent of the liability charged by the indenture of mortgage of November 20, 1899, upon the lands comprised in it be kept steadily in view, and be taken in connection with the course of dealing followed by the parties from that date down to the institution of the suit out of which this appeal has arisen, the rights and liabilities of the appellants and respondents admit, in my view, of little doubt. By this mortgage William J. Yourell, styled in the deed and hereinafter referred to as the mortgagor, the beneficial owner of the lands of Neilstown and Ribstown, charged these lands with the payment to the respondents (styled in the deed the bank) or their assigns of "the moneys for the time being due and owing to the bank or their assigns on foot of the covenant for payment by the mortgagor" therein contained. Francis Yourell as beneficial owner of the fee simple lands of Killester conveyed them to the bank to hold subject to the provision for redemption therein contained, and Denis Yourell as beneficial owner of the lands of Piercetown charged them with the payment of the moneys for the time being owing to the bank on foot of the covenant already mentioned. This covenant is a covenant to pay to the bank, not only the sum of 5700*l.* (erroneously stated to be then due by him to them) on February 20 then next ensuing, with interest in the meanwhile at the current rate of the bank up to 6 per cent. per annum, but also to pay to them on demand "the balance which, on any account or accounts present or future between the mortgagor and the bank, either alone or jointly with any other person or persons, shall for the time being be owing by the mortgagor to the bank on foot of overdrafts, bills of exchange, promissory notes, loans, credits, advances, interest, commission, discount, premiums on policies of assurance, costs, customary charges or otherwise"; whether the mortgagor should be liable therefor as principal or surety; and if the sum of 5700*l.* or any part thereof should remain

H. L. (I.) 1917

YOURELL v. HIBERNIAN BANK.

Lord Atkinson.

unpaid after May 20 then next ensuing, or if the aforesaid balance should remain unpaid as thereinbefore provided, to pay to the bank, so long as money should remain due to it, on foot of the security thereby created, by equal half-yearly payments on May 20 and November 20 in each year, interest computed from day to day at the rate aforesaid. The deed contained a proviso for redemption upon payment upon February 20 of this sum of 5700*l.*, with interest as therein provided, and also on the payment on demand of the balance then owing by the mortgagor to the bank pursuant to the above-mentioned covenant. At the date of the mortgage the sum due by the mortgagor to the bank only amounted to 84*l.* 9*s.* 5*d.*, so that the sum of 5700*l.* would seem to have been fixed upon as the limit of the debit balance which it was then contemplated the mortgagor would be permitted to owe on his current and other accounts. Accordingly a provision was introduced into the deed to the effect that no greater principal sum than 5700*l.* should be recoverable under it, but that to this extent it should be a continuing security to the bank as well for money due on current securities and current accounts as for money actually payable, not to be prejudiced by the settlement of any account or by any collateral or other security for any of the money intended to be by the deed secured. According to the true construction of this clause the bank would be entitled to recover on the mortgage such principal sum as should from time to time be due under the before-mentioned covenant not to exceed 5700*l.* in amount, with interest on the former sums at the stipulated rate. Whenever on balancing the mortgagor's current account with the bank a debit balance was found against him, that balance, by force of the covenant, became part of the principal moneys secured by the mortgage, subject, however, to the above-mentioned limit. Whatever increased that balance increased the amount of these moneys; whatever diminished it diminished their amount. If sums paid into the bank were, with the consent of the mortgagor, credited to him by the bank in this current account as against that balance, it necessarily followed that they were, by the implied agreement of the parties, appropriated pro tanto to the payment of what had become the principal money then due under the deed. The course of dealing actually followed by the parties, from the date of the mortgage

down to the bringing of the action, was this: Interest was calculated from day to day on the mortgagor's overdraft on his current account. On the balancing of this account each half-year the amount of this interest was entered on the debit side of the account, a balance was then struck, and interest was charged during the next half-year upon that balance. The bank, by taking the account with these half-yearly rests, secured for itself the benefit of compound interest. This is a usual and perfectly legitimate mode of dealing between banker and customer. The main contention of the respondents upon this appeal was that although this course of dealing had been, in fact, practically followed up to the bringing of the action, and the accounts kept in this way, yet, owing to what took place in the month of December, 1904, they are entitled to have the accounts reopened and taken from that date downwards, not as hitherto, but as between mortgagee and mortgagor. The principal question for decision is, Can that contention be, upon the facts, sustained? The Court of Appeal came to the conclusion that the mortgagor's current account, though in form kept open and operated upon from December 17, 1904, for the succeeding nine years must, on the facts, be taken to have been closed upon that day and to thence have ceased to be operative. They treated that conclusion as crucial upon the questions of the mode of accounting to be thenceforth adopted, and as to the present indebtedness of the mortgagor. In my view the facts do not lead to any such conclusion. On June 30, 1903, the debit balance against the mortgagor on his current account amounted to 2949*l.* He was also indebted to the bank on certain promissory notes maturing in the following November in a sum of 3300*l.* His total indebtedness amounted to 6549*l.* 1*s.* 6*d.*, thus exceeding by 849*l.* 1*s.* 6*d.* the limit placed upon the amount of the principal moneys recoverable under the mortgage. To bring his indebtedness practically within that limit he was required by the bank to reduce his liability on his current account by a sum of 800*l.*, else they would refuse thenceforth to honour his cheques. He endeavoured to comply with that demand, and the mode in which his efforts to that end were dealt with by the bank is instructive. On December 21, 1903, he lodged to the credit of his current account a sum of 225*l.* 9*s.* 7*d.* On the 31st of that month his account was balanced, when his debit balance,

H. L. (I.) 1917 — YOURELL v. HIBERNIAN BANK. — Lord Atkinson.

made up in the usual way, was found to amount to 2820*l.* 3*s.* As against that balance he on January 1 and 4, 1904, lodged the respective sums of 150*l.* and 174*l.* 10*s.* 5*d.* These were the last lodgments made by him directly. On the balancing of his current account on June 30, 1904, this debit balance was found to be 2579*l.* 4*s.* 11*d.* Having failed to comply to the full extent with the bank's demand, the respondents, by their deed poll dated December 17, 1904, purporting to be made in exercise of the powers conferred by the 19th section of the Conveyancing and Law of Property Act of 1881, appointed a Mr. Patrick Leonard, a local auctioneer, receiver of the rents and income of the lands comprised in the mortgage, with all the powers conferred on a receiver by this Act, to the intent that he should apply all the moneys received by him in the manner directed by sub-s. 8 of s. 24 thereof, save that he should pay to Francis Yourell and Denis Yourell a sum of 8*l.* per month (96*l.* per annum) from the date of the deed out of the lands of Piercetown towards their maintenance at Neilstown. By sub-s. 2 of this 24th section it is provided that a receiver appointed under the Act is to be deemed to be the agent of the mortgagor, who is to be answerable for his acts or defaults unless the mortgage deed should otherwise provide. Sub-s. 8 of s. 24 prescribes that the receiver shall apply the money received by him (1.) in discharge of the rates, taxes, and outgoings; (2.) in keeping down all annual sums and other payments and the interest on incumbrances prior to that whereof he is receiver; (3.) in payment of his commission and of premiums on fire, life, or other insurances properly payable under the mortgage deed or under the Act, and the cost of necessary or proper repairs directed in writing by the mortgagee to be done; and (4.) in payment of the interest accruing due in respect of the principal money due under the mortgage, the residue of the money received by him to be paid to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property. It has been strongly pressed on behalf of the respondents that by this latter clause a statutory duty is imposed upon the receiver to pay from time to time the surplus money remaining in his hands, after satisfying the claims arising under the earlier provisions of the section, in discharge of the interest accruing due on the mort-

gage; that he could not be relieved from that duty; and that the application of any portion of the surplus to the payment pro tanto of the principal was illegal and wholly void and not binding on any one. I respectfully dissent from that proposition; not a shred of authority was cited in support of it. Such a duty as the statute imposes on the receiver under head 4 of this sub-section is not owed by him to the Crown or to the general public. It is owed merely to the mortgagor, the mortgagee, and to puisne incumbrancers. It was not proved that there were any puisne incumbrancers other than the appellants. No doubt any one of those persons who was prejudiced by the alleged misapplication by the receiver of these surplus moneys might hold his principal, the mortgagor, or himself responsible; but it is not competent for the person who procures the breach by the receiver of his so-called statutory duty once or twice every year for a period over eight years, with the full concurrence and consent of the mortgagors, who now, together with the puisne incumbrancers, approve of, adopt, and rely upon the course pursued, to repudiate the results of the mode of application of the moneys he himself has procured to be adopted. In the present case the respondents alone complain of what was practically their own act. If their contention were sound, the payment of 8*l.* per month out of the rents of Piercetown for the maintenance of the persons named, enjoined on the receiver by their own deed poll, was a flagrant breach by him of the statutory duty imposed on him by s. 24, sub-s. 8. That sub-section forbids any such application of the moneys received by the receiver. Could the bank now turn round and hold the mortgagor or the receiver himself responsible for this default? That would be grossly unjust, and could not by any Court of Equity be permitted. But if the authorizing of this payment by the bank and the consent to it by the others interested is enough to prevent injustice being perpetrated in the one case, the like conduct and action of the parties should be equally effective to prevent it in the other. The mode in which the respondents financed and dealt with the receiver was this: They opened an account with him at their head office in Dublin. This account was headed "The Hibernian Bank, Limited, Account with Yourell Navan Estate Lettings." In this account the receiver was credited with the amounts received by him from

H. L. (I.) 1917

YOURELL v. HIBERNIAN BANK.

Lord Atkinson.

the lettings of the mortgaged lands. Any cheques drawn upon the account were, before being paid, countersigned by the manager whether the account was in credit or not, and the surplus standing to credit every year was transferred by the bank to the credit of the mortgagor's current account. In my view the contention of the respondents on this point is wholly unsustainable.

For the half-year ending June 30, 1905, as the receiver was not yet in funds, the outgoings, such as rent and taxes, were debited against the mortgagor in his current account. Interest on his previous overdraft was also debited against him and a debit balance brought out of 3797*l.* 16*s.* 3*d.* For the half-year ending December 30 in that year the debits are: poor rate on Neilstown, premiums on a life insurance, a half-year's interest on the overdraft of 3797*l.* 16*s.* 3*d.*, 104*l.* 16*s.* 6*d.* The item to credit is the net proceeds of lettings for the year, 281*l.* 1*s.* 9*d.* The debit balance brought out is 3347*l.* 4*s.* 1*d.* This is a fair specimen of all the other half-yearly accounts. In the month of October, 1910, the farm of Neilstown was sold by auction, apparently by the bank under its power of sale, Mr. Leonard being the auctioneer. It may well be that the purchase-money, in the absence of agreement to the contrary, should have been applied first in payment of the interest due and the costs, and the balance either paid to the mortgagor or applied in reduction of the principal; but what occurred was this, that in the half-year ending December 31, 1910, a sum of 2589*l.* 12*s.*, a portion of the purchase-money, is credited to the mortgagor in his current account. He is as usual debited with interest, 107*l.* 10*s.*, on the debit balance found against him on June 30 previous, and a debit balance brought out at 1443*l.* 15*s.* 6*d.* In the account for the half-year ending June 30, 1911, two further portions of the purchase-money, making together the sum of 951*l.* 1*s.* 8*d.*, are credited. A sum of 306*l.* 16*s.* 8*d.*, "balance paid by the receiver *re* working of the lands in the year 1910," is also credited, and the debit balance brought out is reduced to 275*l.* 5*s.* 8*d.* In the half-year ending June 30, 1913, the balance is further reduced by the lodgments of the proceeds of lettings made by the receiver to 12*l.* 15*s.* 2*d.* The 24th section of the Act of 1881 cannot obviously have any reference to the purchase-money of Neilstown. These accounts were copied into the mortgagor's pass book. The book

was from time to time sent to him and by him acknowledged in writing to be correct. Save a bill account, no account other than this current account was ever kept between the mortgagor and the bank. It was kept in its usual form up to December 31, 1914—over twelve months after the action was brought. It is not pretended that any of the parties concerned acted as they have acted under any mistake of law or fact or were ignorant of their rights or that any fraud was practised upon them.

The Court of Appeal in Ireland held, however, that by the refusal of the bank to cash the mortgagor's cheques, followed by the appointment of the receiver, the mortgagor's current account was closed on December 17, 1904, and that the respondents were entitled to have an account taken from that date onward on another basis, namely, that of mortgagor and mortgagee. Well, for the ten years succeeding that date the receiver, the agent of the mortgagor, through the instrumentality and by the procurement of the mortgagees, paid into the bank from time to time large sums to the credit of that account of his principal. The mortgagees themselves paid to the credit of that account the purchase-money of the portion of the mortgaged lands they sold. As against those lodgments the mortgagor was each half-year debited with many items; balances were struck half-yearly, and interest charged on those balances. It is quite true that in 1904 the bank refused to honour the mortgagor's cheques, but even this provision was not rigidly adhered to, for from August 16, 1904, to December 3, 1904, the mortgagor, at the request of the bank, drew eight cheques upon it in respect of the payments made by the bank to meet some of the outgoings of the mortgaged lands, which payments the respondents now claim to be salvage payments. Under those circumstances I do not think that this current account ceased to be a living mercantile account or that compound interest was not properly chargeable upon it. The case cited by the respondents in support of the decision of the Court of Appeal, namely, *Crosskill* v. *Bower* (1), makes against rather than for them. There a customer of a bank who had been charged compound interest on his overdraft on his two accounts gave the bank a security for all the money due or to become due on these accounts with 5 per cent.

(1) 32 Beav. 86.

H. L. (I.) 1917

YOURELL v. HIBERNIAN BANK.

Lord Atkinson.

interest. In January, 1855, when both accounts were largely overdrawn, he assigned all his real and personal estate to trustees in trust for his creditors. On the execution of this deed the customer ceased to carry on his business, and from thenceforth neither paid into nor drew out of the bank any moneys whatever, while the trustees of the deed opened for themselves two separate accounts for the purposes of the former business of the customer thereafter carried on by them. It was held by the Master of the Rolls that the bank were entitled to charge compound interest down to the date of the deed but thereafter only simple interest. In his judgment the Master of the Rolls said (1): "I look at it" (i.e., the giving of the security) "in the same light as if a customer, keeping an account with the bank, had died; if, in that case, no fresh account had been opened by his executor, all that the bankers could have claimed against his estate would have been, the balance due at his death, which would be a mere simple contract debt and not carrying interest at all. The arrangement between a customer and the bank terminates on his death, and in the absence of any contract varying it, all interest would cease at that period. It would be exactly the same if the balance were in his favour, and the bankers had died or ceased to carry on business, or had become bankrupt." He then proceeds (2): "But this stoppage of interest is not confined to case of death; a customer may say to his banker 'I close my account with you and will have no further dealings with you from this day.'" He held that the deed appointing the trustees, coupled with their subsequent action, closed the current mercantile account of the customer and terminated the commercial dealing between them. That case is entirely different from the present, and shows that to bring about the result contended for there must be a complete termination between the banker and his customer of all the mercantile dealings between them.

As regards the alleged salvage payments, the bank, by honouring the cheques drawn by the mortgagor in respect of them, practically lent to him the money to pay these outgoings. By debiting these sums against him in his current account the bank secured for itself compound interest upon them. And, further, by balancing the account in the usual way these payments became secured under

(1) 32 Beav. 92. (2) Ibid. 93.

the mortgage deed as principal moneys and charged upon the land subject to the alleged lien. Under these circumstances I think the lien for all the alleged salvage payments, even if it existed, was lost by debiting the payments, as they were in fact debited : *Bank of Africa* v. *Salisbury Gold Mining Co.* (1) ; *In re Morris.* (2) The mortgagor's covenant, of course, makes him liable to pay the interest on the overdue promissory notes. As to the opening of the current account and taking an account upon a new principle, no fraud is alleged, no relief is sought against a person in a fiduciary position, no specific errors are alleged to exist, and there is no pretence for saying that the parties acted, as they did in *Daniell* v. *Sinclair* (3), under a mutual mistake as to the effect of the mortgage deed. The account was kept in writing and approved of in writing. Up to the last it was copied into the mortgagor's pass book and never objected to by him. In *Willis* v. *Jernegan* (4) Lord Hardwicke, in delivering judgment, said : " The plaintiff's counsel have made two objections to the defendant's plea of a settled account. 1. That it was not signed by the parties. 2. That the vouchers were not delivered up at the time. As to the first, there is no absolute necessity that it should be signed by the parties who have mutual dealings, to make it a stated account, for even where there are transactions, suppose between a merchant in England and a merchant beyond sea, and an account is transmitted here from the person who is abroad, it is not the signing which will make it a stated account, but the person to whom it is sent, keeping it by him any length of time, without making any objection, which shall bind him, and prevent his entering into an open account afterwards." As to the vouchers, he said it is not necessary to deliver them up at the time the account is settled. " For instance, in the case of bankers and their customers, it is seldom done, but the drafts which are made upon them are constantly kept on files, and at different times, when they settle accounts with you, they only enter in a book which they give you for that purpose the several receipts and payments during your transactions with their shops." He goes on to say it would be imprudent of them to do otherwise. In my opinion this current account was in the

(1) [1892] A. C. 281, 284.
(2) [1908] 1 K. B. 473, 477.
(3) 6 App. Cas. 181.
(4) (1741) 2 Atk. 251, 252.

H. L. (I.) 1917 YOURELL v. HIBERNIAN BANK.

present case a settled account up to June 30 before the bringing of the action, and should for the reasons given not be reopened as claimed: *Taylor* v. *Haylin* (1); *Williamson* v. *Barbour* (2); *Gething* v. *Keighley* (3); *In re Webb.* (4)

I think the respondents fail on all points raised in this appeal. I approve of the order suggested by the Lord Chancellor.

LORD PARKER OF WADDINGTON. (5) My Lords, the action in which this appeal arises is an action to enforce a mortgage, and the questions for decision are questions affecting the manner in which the account between mortgagor and mortgagee is to be taken for the purpose of redemption. The mortgage, which is dated November 20, 1899, comprised the following four properties—namely, (1.) a farm known as Neilstown, belonging to William J. Yourell; (2.) a farm known as Ribstown, also belonging to William J. Yourell; (3.) a farm known as Killester, belonging to Francis Joseph Yourell; and (4.) a farm known as Piercetown, belonging to Denis Yourell. The present appellants joined in the mortgage for the purpose of postponing a charge to which they were entitled under their father's will in the three farms known as Ribstown, Killester, and Piercetown respectively. The mortgage was to secure payment to the respondent bank of the moneys for the time being due or owing to them on foot of the covenant for payment on the part of William J. Yourell therein contained, the proviso for redemption being limited to take effect on payment of those moneys. The mortgage, however, contained a clause providing that no greater principal sum than 5700*l.* should be recoverable on the security of the mortgage. In taking an account between mortgagor and mortgagee for the purposes of redemption a Court of Equity will in proper cases allow interest, but it will not, except perhaps under very special circumstances, allow interest on a greater sum than the principal recoverable out of the mortgage premises. It follows, therefore, that the proviso limiting the principal which can be so recovered to 5700*l.* limits also the interest recoverable to interest on 5700*l.*, or, if any sums have been already

(1) (1788) 2 Bro. C. C. 310; 3 Bro. C. C. 266.
(2) (1877) 9 Ch. D. 529.
(3) (1878) 9 Ch. D. 547.
(4) [1894] 1 Ch. 73.
(5) Read by Lord Dunedin.

recovered in respect of principal, to interest on 5700*l.* less the sum so recovered.

My Lords, notwithstanding the recital contained in the mortgage there was at the date thereof a sum of 84*l.* 7*s.* 6*d.* only due by William J. Yourell to the respondents. This sum was the then debit balance on his current banking account with the respondents' firm, and was shortly afterwards discharged by credits to that account. For all practical purposes, therefore, the moneys which William J. Yourell covenanted to pay, and to secure which the mortgage was given, may be taken as (1.) the balance for the time being due on his current banking account, and (2.) the moneys due in respect of the several promissory notes for 3600*l.*, signed by William J. Yourell and dated August 26, 1903.

In keeping William J. Yourell's current banking account, which was continued in the books of the bank from the date of the mortgage until after the institution of the present action, the respondents charged him with interest from day to day on his debit balance for the time being, and, the account being kept with half-yearly rests, the interest so charged was capitalized every half-year. The respondents' right to keep the account in this way is not disputed, but the effect of so keeping it was that every payment to the credit of the account went in reduction of the principal secured by the mortgage.

My Lords, on July 30, 1903, there was due to the respondents on foot of the current banking account of William J. Yourell a sum of 2963*l.* 18*s.* 10*d.* besides the 3600*l.* due on his several promissory notes. Under these circumstances the respondents required the overdraft to be reduced by at least 800*l.* William J. Yourell having failed to reduce his overdraft by this sum, the respondents refused to honour his cheques except such as were drawn for purposes approved by their manager. Among the cheques which having been so approved, were, in fact, subsequently honoured by the respondents were certain cheques drawn for the purpose of preserving the subject-matter of the security. The respondents themselves also made payments for the like purpose, debiting the same to the overdrawn account. If William J. Yourell did not originally consent to these debits, there can be no doubt that he subsequently approved them. The sums thus paid to preserve

H. L. (I.) 1917

YOURELL v. HIBERNIAN BANK.

Lord Parker of Waddington.

the subject-matter of the security, either by the cheques of William J. Yourell or by the respondents themselves, amounted on December 17, 1904, to 597*l.* 19*s.* 7*d.* The respondents contend that they have a salvage lien on the subject property for this sum with interest and that it ought not, therefore, to be reckoned in the 5700*l.* to which the amount of principal recoverable under the mortgage is limited. This is the first point which your Lordships have to decide.

My Lords, there can be no doubt that a mortgagee has a lien on the mortgaged premises for moneys paid by him to preserve the subject-matter of his security. The only question in the present case is whether the payments made for that purpose were in reality made by the respondents, or whether they were not in reality made by William J. Yourell himself out of moneys advanced to him by the respondents. In my opinion the latter is the true view. When a customer is allowed by a bank to overdraw his banking account the result at law is that the bank advances to the customer the amount by which the account is overdrawn; and the same result follows when a bank, with the consent of the customer, debits the account with payments made by the bank on the customer's behalf. In the present case the true position seems to be that the 597*l.* 19*s.* 7*d.* was advanced by the respondents to William J. Yourell, and that the payments to preserve the mortgaged property were made by the latter and not by the respondents themselves. If this be so, there can be no question as to a salvage lien. It should be observed that for the sums thus advanced the respondents obtained the security not only of the covenant of William J. Yourell contained in the mortgage, but also of the mortgaged property. They also became entitled to interest thereon at a higher rate than the interest allowed in equity on a salvage lien. But for the limitation of the principal recoverable under the mortgage they were thus in a better position than would have been the case if, having made the payments themselves, they had to rely on a salvage lien only. This consideration is sufficient to account for the way in which they dealt with the matter. What I have said as to the 597*l.* 19*s.* 7*d.* is equally applicable to the payments which the respondents claim to have made for the purpose of preserving their security after December 17, 1904.

My Lords, it appears that the respondents on December 17, 1904, by virtue of the powers in that behalf conferred on them by the Conveyancing Act, 1881, appointed a receiver of the mortgaged premises. The deed effecting the appointment recited that a principal sum of 5700*l.* still remained due on the mortgage with an arrear of interest, and the appointment was expressed to be made to the intent that the receiver should apply all moneys received by him as directed by s. 24, sub-s. 8, of the Act, except that he was to permit Denis Yourell and his mother to retain possession of the dwelling-house and offices on the Piercetown farm with the adjoining paddocks, containing about eight acres, for their own use, and was to pay them 8*l.* a month out of the proceeds of letting the said farm. The receiver thus appointed took possession of the mortgaged property, with the exception of that part thereof which was to be retained by Denis Yourell and his mother, and proceeded to let and manage the property. For the purpose of the receivership he opened an account with the respondent bank, into which he paid his receipts and upon which he drew for all payments he required to make in connection with the receivership, being at times allowed to overdraw for necessary outgoings. The account was balanced at the end of every year, and if at the end of any year there was a credit balance the amount of such credit balance was carried over and credited to William J. Yourell's current account. In 1910 the respondents, in exercise of their powers under the mortgage, sold the farm called Neilstown for 3540*l.* They also received two sums of 18*l.* and 10*l.* as compensation for labourers' plots taken compulsorily under certain statutory powers. All these sums were also credited by the respondents to the current account of William J. Yourell. The second question your Lordships have to decide is whether the balances carried from the receivership account and the 3540*l.*, the 18*l.*, and the 10*l.* credited as above mentioned to the account of William J. Yourell must be considered as principal recovered by virtue of the security and go in reduction of the 5700*l.* to which the principal which can be so recovered is limited.

My Lords, it was not contended on behalf of the respondents that the moneys thus carried over and credited were not recovered by virtue of the mortgage sued upon, nor was it disputed that if

H. L. (I.) 1917

YOURELL v. HIBERNIAN BANK.

Lord Parker of Waddington.

the current account of William J. Yourell is left undisturbed and unrectified these moneys were, in fact, appropriated and went in reduction of the principal secured by the mortgage. The respondents' contention was that the banking account was, as a current banking account, in fact closed, or at any rate ought to be treated as closed, on December 17, 1904, the date of the receivership deed, and not to have been continued after that date. They desire, therefore, to strike out all entries after December 17, 1904, reincorporating them in an account to be taken in these proceedings as between mortgagor and mortgagee, and not between banker and customer. In this way they seek not only to avoid the reduction of the principal which can be recovered by virtue of the mortgage in the manner I have mentioned, but to entitle themselves to a salvage lien in respect of the sums paid to preserve their security, and which they debited to the account after December 17, 1904. They say that the account (looked upon as a current account) was in fact closed on or before December 17, 1904, because prior to that date they had refused to allow William J. Yourell to draw upon it for any purpose he pleased, only allowing him to draw for purposes of which their manager approved. I cannot, however, agree that a current banking account is closed merely because of a refusal on the part of the bank to allow further overdrafts or merely because the bank might have closed it. As a matter of fact the account was continued for many years with entries on either side, each entry representing a transaction between banker and customer. Why should these transactions be disturbed? It may well be that the respondents might have closed the account had they desired to do so. It may well be that they could not have been compelled to enter into some of the transactions recorded in the account. They certainly could not have been compelled to make the further advances to William J. Yourell which they in fact made, whether for purposes connected with the mortgaged property or otherwise; but they did, in fact, make these further advances. In like manner it may well be that William J. Yourell could not have been compelled to accept such advances or to submit to being charged with compound interest, but he did in fact accept and become personally liable for these advances, and did in fact submit to being charged with this interest. I cannot

see what equity the respondents have to disturb or set aside these transactions. There has been no fraud, misrepresentation, or mistake. The fact that they might have closed the account in 1904 and need not have entered into the transactions subsequently recorded can give rise to no sort of equity on their part. It is by no means uncommon that a secured debt has been discharged in whole or in part because of the manner in which a banking account has been kept, but this has never been considered any reason for disturbing the account.

My Lords, considerable stress was laid in argument upon the provisions of s. 24, sub-s. 8, of the Conveyancing Act, 1881. These provisions prescribe the duty of the receiver in connection with the application of all money received by him by virtue of his receivership. After providing for certain payments which have priority over the mortgagee's claim for interest, he is directed to pay the interest accruing due on the principal money secured by the mortgage, and then to pay the ultimate balance (if any) to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property. It is urged that because of these provisions it was illegal for the receiver to allow his credit balances to be transferred to the current account and so go in discharge of principal. It is said those balances ought to have been appropriated to payment of accruing interest and interest in arrear in respect of the 3600*l.* promissory notes, and that any surplus after such appropriation ought to have been paid to the persons who, but for the possession of the receiver, would have been entitled to receive the income of the property. I cannot, however, see why these provisions should not be varied with the consent of the parties interested. The persons interested were, as to the farms known as Neilstown and Ribstown, William J. Yourell, as to the farm known as Killester, Francis Joseph Yourell, and as to the farm known as Piercetown, Denis Yourell. With the consent of these persons there would be nothing illegal in the receiver allowing the balances to be dealt with in the way he did. I think the inference to be drawn is that the proper consents were given. At any rate, it appears that all these persons, being parties to the action, have throughout relied on the correctness of the current account and resisted any rectification thereof. This operates as

H. L. (I.) 1917 YOURELL v. HIBERNIAN BANK. Lord Parker of Waddington.

a ratification on their part, even if they did not originally consent to what was done. I cannot see that under the circumstances the respondents can rely on the illegality alleged.

There seems to be still less reason for disturbing the account so far as the credits of the 3540*l.*, 18*l.*, and 10*l.* are concerned. It is quite true that a mortgagee is entitled to appropriate the proceeds of sale of the mortgaged property in payment, in the first place, of interest and costs rather than in payment of principal. But if, with the consent of or without objection from the mortgagor, he appropriates such proceeds, in the first place, to payment of principal (a course less advantageous to himself and more advantageous to the mortgagor), there can be no possible reason why the appropriation should be subsequently disturbed.

My Lords, in the result I have come to the conclusion that the order appealed from was erroneous and should be set aside. I find myself in full agreement with the Master of the Rolls and Cherry C.J. except on one single point. It appears that the Master of the Rolls in his judgment overlooked the fact that there was at the commencement of this action an arrear of interest on the 3600*l.* promissory notes. There seems to be no reason why this arrear of interest should not be recoverable, provided that the interest allowed from time to time does not exceed interest on 5700*l.*, or on such less sum as shall result from the deduction from 5700*l.* of any sum already realized from the mortgaged premises in respect of principal. I think the best course will be to make a declaration to that effect, and subject thereto to restore the order of the Master of the Rolls. The respondents must pay the costs of the appeal.

LORD WRENBURY. (1) My Lords, the mortgage of November 20, 1899, was expressed to secure the moneys for the time being due and owing to the bank on foot of the covenant for payment by the mortgagor contained in the deed. That covenant was for payment (inter alia) of the balance for the time being owing on foot of overdrafts, bills of exchange, credits, advances, interest, commission, discount, and premiums on policies of assurance.

(1) Read by Lord Atkinson.

The security was to bear interest computed from day to day at not exceeding 6 per cent. The bank were therefore entitled to security for current account and interest on current account and for bills and interest on bills. The whole of this was, however, controlled by a proviso that no greater principal sum than 5700*l.* should be recoverable on the security. The bank were therefore entitled as against the security to principal not exceeding 5700*l.*, and, in addition, interest to such amount as might be due.

The mortgagor had a current account with the bank, and the course of business was that interest was charged upon the overdraft and the interest capitalized half-yearly. For the period down to June, 1903, the account was continued in normal course, and on June 30, 1903, the position was that a sum of 2949*l.* 1*s.* 6*d.* was due in respect of overdraft, and the bank further held bills for 3600*l.* which were current. From and after June 30, 1903, the bank were not prepared to allow further overdraft, and the amount due, namely, 6549*l.* 1*s.* 6*d.*, being in excess of the 5700*l.* (the limit of principal secured by the mortgage), they required the mortgagor to reduce his overdraft by at least 800*l.* He made three payments to the credit of his account to an aggregate amount of 550*l.*, but failed to lodge the balance. Under these circumstances the bank declined and ceased to honour the mortgagor's cheques on the current account (refused, that is, to make him further advances), except in certain particular cases in which, for reasons personal to themselves, they thought fit so to do—they were cases in which the cheque was for payment of rates, tithes, premiums on fire or life policies and the like. On December 17, 1904, the bank appointed a receiver under the Conveyancing Act, 1881. The Court of Appeal in Ireland have held that the current account was closed on December 17, 1904. My Lords, I am unable to agree with this decision. Why the Court of Appeal took the date of appointment of receiver as the date of closing the account I do not know. The fact that the bank appointed a receiver seems to me to be irrelevant to the question whether the account was closed or not. That question must be determined upon ascertaining whether as a matter of fact the account was closed. The facts are that except that the bank had refused to honour further

H. L. (I.) 1917 YOURELL v. HIBERNIAN BANK. Lord Wrenbury.

cheques — refused, that is, to make further advances — the account was continued as before. Certain payments, as will be presently stated, were made into it. Certain withdrawals, as above stated, were made from it. Interest was debited and capitalized half-yearly as before. The account continued, in my judgment, to be an open account and a current account to which the provisions of the mortgage deed continued to be applicable.

The action is one for an account of the amount due upon the mortgage. The banking account being an open account, it remains only for the purpose of that account to determine the following questions :—

First : The interest upon the overdraft was capitalized half-yearly. The mortgage was to secure (inter alia) the debit balance of that account. It follows that, as against the bank, the capitalized interest must be regarded as principal for the purpose of the proviso in the mortgage which limits the principal sum to be recovered to 5700*l.*

Secondly : As from 1903 onwards the bills, amounting to 3600*l.*, were not included in the current account. The interest upon those was not capitalized. The arrears are interest secured by the mortgage and are not to be taken into account for the purpose of the limit of 5700*l.*

Thirdly : In October, 1910, the bank sold Neilstown, a property included in the mortgage, and received by certain instalments an aggregate sum of 3540*l.* 13*s.* 8*d.* They credited these instalments as received in the current account, thus reducing the overdraft but not bringing the account into credit. The debit balance of the overdraft was principal. They were, therefore, applying proceeds of the security in reduction of principal when there were due arrears of interest. This was to the benefit of the mortgagor, and it was done by the mortgagee. The appropriation thus made cannot be disturbed. At the date of each such credit the principal sum due and recoverable under the mortgage and bearing interest under the mortgage was diminished pro tanto.

Fourthly : The receiver, who was, of course, receiver of rents and income, received from time to time certain sums. His duty

under the Act of 1881, s. 24, sub-s. 8, was, after keeping down the payments there mentioned, to pay the interest due under the mortgage and to pay the residue to the mortgagor. The amounts received never, I think, sufficed to pay the interest due, so nothing turns upon the fact that any residue has to be paid to the mortgagor. What in fact happened was that the receiver paid the amounts to the credit of the banking account; in other words, he paid them to the mortgagor. He ought to have paid them to the mortgagees in reduction of interest. But the mortgagees were the bankers, and in placing them to the credit of the mortgagor's current account they were assenting to payment being made to the mortgagor to the credit of his current account, with the result that they went, not to reduction of interest, but to part payment of principal. This appropriation, again, cannot be disturbed. At the date of each credit the principal sum due and recoverable was diminished pro tanto, and the sum upon which interest is to be calculated is accordingly reduced.

Fifthly: Upon the question of salvage payments I agree with that which was said by the Master of the Rolls. The bank put the advances which were made by way of salvage into the current account; in other words, they advanced those sums to the mortgagor and thenceforward charged him 6 per cent. compound interest upon them. It is impossible after this that they can say that they are sums outside the current account, and therefore outside the mortgage, carrying interest at 4 per cent., and not to be taken into account for the purpose of the limit of 5700*l.* upon the principal sum recoverable under the mortgage.

My Lords, in my judgment, the order of the Court of Appeal must be discharged and the order of the Master of the Rolls restored. But I think that for greater clearness the declaration in the last-mentioned order should be amplified in the following manner: The first declaration should be that "no greater principal sum than 5700*l.* and no interest in excess of interest upon 5700*l.* or such less sum as shall have been or shall be for the time being recoverable as principal was recoverable on foot of the indenture of mortgage," &c. With this addition the order of the Master of the Rolls should, I think, be restored and the respondents ordered to

H. L. (I.) 1917

YOURELL v. HIBERNIAN BANK.

pay the appellants their costs in the Court of Appeal and in this House.

1918. Feb. 5. This appeal was further considered as to the form of the order. The order as amended was as follows :—

Order of the Court of Appeal in Ireland, in part complained of, set aside, and judgment of the Master of the Rolls, thereby in part discharged, varied, by inserting after the words "no greater principal sum than 5700l." the words "and no interest in excess of interest upon 5700l. or such less sum as shall have been, or shall be for the time being, recoverable on foot of the indenture of mortgage" and by inserting instead of the words "having been credited by the plaintiffs as principal moneys" the words "in so far as the same have been credited by the plaintiffs as principal moneys for the time being due to them," and, subject to such variations, restored. The respondents to pay the costs in the Court of Appeal in Ireland, and also the costs of the appeal to this House, the said last mentioned costs not to include the costs of the further consideration this day.

Lords' Journals, February 5, 1918.

Solicitor for appellants : *R. L. S. Badham, for Terence O'Reilly & Sons, Dublin.*

Solicitors for respondents : *Beveridge & Co., for D. & T. Fitzgerald, Dublin.*

[PRIVY COUNCIL.]

FUNG PING SHAN AND ANOTHER . . . . APPELLANTS; AND TONG SHUN . . . . . RESPONDENT.

J. C.* 1917 Dec. 7.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Conveyance—Identity of Purchaser—Deed signed in Name of another—Legal Estate—Covenant—Election to postpone prior Equity.

The respondent, a Chinese resident of Chicago, and his nephew, who resided at Victoria in Hong Kong, had names which were each properly rendered in English as Tong Shun but which differed when written in Chinese characters. By a deed signed, sealed, and delivered by the nephew in 1909 leasehold land was conveyed to "Tong Shun, of Victoria, in the Colony of Hong Kong," thereinafter called "the purchaser"; the deed witnessed that "the purchaser" had paid the consideration, and contained covenants on his part. The nephew signed the deed with the respondent's name written in Chinese character; he paid the consideration, but with money supplied by the respondent. In 1913 the nephew, in fraud of the respondent, created an equitable mortgage upon the land in favour of the appellants. In 1914 the respondent took from his nephew a conveyance of the legal estate subject to the appellants mortgage, the nephew covenanting to pay to the respondent the amount due upon the mortgage. The respondent subsequently sued for a declaration that he was entitled to the land free from the appellants' mortgage:—

Held—(1.) that under the conveyance of 1909 the legal estate did not pass to the respondent, but passed to his nephew subject to a trust in favour of the respondent; (2.) that the respondent by the transaction of 1914 had elected not to keep alive against the appellants his prior equitable estate, and that the appellants could claim the benefit of that transaction although they were not parties to it.

APPEAL from a judgment of the Supreme Court of Hong Kong, Appellate Jurisdiction (May 12, 1916), affirming a judgment of the Chief Justice.

The action was brought by the respondent against the appellants claiming a declaration that he was absolutely entitled to certain

* *Present:* LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

J. C. 1917 FUNG PING SHAN v. TONG SHUN.

leasehold land at Victoria, Hong Kong (registered as Lot 556), and that the appellants had no interest therein under a mortgage dated December 24, 1913.

The material facts appear from the judgment of their Lordships. The action was tried by the Chief Justice (Sir W. Rees Davies), who made a declaration and order as prayed.

Upon appeal to the Full Court, Sir Haviland de Saumarez J. and Gompertz J., the former was for allowing the appeal and the latter for dismissing it. The judgment of the Chief Justice was consequently affirmed.

1917. Nov. 14, 15, 19, 20, 21. *Upjohn, K.C.*, and *Owen Thompson*, for the appellants. The legal estate in the property passed under the conveyance of September 17, 1909, to the respondent's nephew. He executed the deed, without a power of attorney from the respondent, and is consequently the party to whom the property was conveyed. The description of the purchaser in the deed is applicable only to the nephew; the vendors had no knowledge of the respondent in the transaction. The respondent left the deeds in the possession of his nephew, who, as appears from the correspondence, he knew was not acting in good faith towards him. He is consequently estopped in equity from setting up a prior equity to that created by the mortgage to the appellants: *Walker* v. *Linom* (1), in which a legal estate was postponed; *Oliver* v. *Hinton* (2); *Northern Counties of England Fire Insurance Co.* v. *Whipp.* (3) In any case the arrangement between the respondent and his nephew in 1914 amounted to an election by the respondent not to keep alive his equitable estate against the appellants. [Reference was also made to *Brocklesby* v. *Temperance Permanent Building Society.* (4)]

Tomlin, K.C., and *J. M. Gover*, for the respondent. The legal estate passed under the conveyance of 1909 to the respondent. He was a partner in businesses in Hong Kong and was aptly described in the deed. There was evidence that it is common among Chinese for one person to execute a deed in the name of another who is the principal. The person who executes a conveyance as purchaser is not necessarily the person to whom the legal estate passes: *Wray*

(1) [1907] 2 Ch. 104.
(2) [1899] 2 Ch. 264.
(3) (1884) 26 Ch. D. 482, 494.
(4) [1895] A. C. 173, 180.

v. *Wray*. (1) The nephew was the authorized agent of the respondent to execute the deed and was not personally a party to any contract created by it. A mistake by one party to a contract as to the identity of the other makes no difference where, as in this case, the mistaken party would have been equally ready to contract with the real principal: *Smith* v. *Wheatcroft* (2); *Nash* v. *Dix*. (3) The legal estate being in the respondent, the mortgage was a forgery and no question of equity can arise. No common law estoppel arises, since, if there was negligence, it was not the proximate cause of the fraud, nor is it material that the respondent had reason to suspect the honesty of his nephew: *Bank of Ireland* v. *Evans' Charities* (4); *Swan* v. *North British Australasian Co.* (5); *Farquharson Brothers & Co.* v. *King & Co.* (6); *Longman* v. *Bath Electric Tramways* (7); *Shropshire Union Railways and Canal Co.* v. *Reg.* (8); *Lewes Sanitary Steam Laundry Co.* v. *Barclay & Co.* (9); *Patent Safety Gun Cotton Co.* v. *Wilson*. (10) The last cited case shows that no negligence makes good a title resting upon a forgery. It is not negligent to leave deeds in the hands of a trustee: *Rimmer* v. *Webster*. (11) The appellants' position was not affected by the transaction of 1914, as they were no parties to, and had no notice of, it.

Upjohn, K.C., in reply. It is not material that the appellants were not parties to the transaction of 1914: *Middleton* v. *Pollock* (12); *New Prance and Garrard's Trustee* v. *Hunting*. (13) Upon appeal to the House of Lords in the latter case (sub nom. *Sharp* v. *Jackson* (14)) the contrary contention was abandoned.

Dec. 17. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. By an indenture dated September 17, 1909, and made between Pang Kit Cheong, thereinafter called the vendor, of the one part, and a person therein described as "Tong Shun, of Victoria, in the Colony of Hong Kong, trader,"

(1) [1905] 2 Ch. 349.
(2) (1878) 9 Ch. D. 223.
(3) (1898) 78 L. T. 445.
(4) (1855) 5 H. L. C. 389.
(5) (1863) 2 H. & C. 175.
(6) [1902] A. C. 325.
(7) [1905] 1 Ch. 646.
(8) (1875) L. R. 7 H. L. 496.
(9) (1906) 95 L. T. 444.
(10) (1880) 49 L. J. (Q.B.) 713.
(11) [1902] 2 Ch. 163.
(12) (1876) 2 Ch. D. 104.
(13) [1897] 2 Q. B. 19.
(14) [1899] A. C. 419.

J. C.
1917
FUNG PING SHAN
v.
TONG SHUN.

and thereinafter called the purchaser, of the other part, it was witnessed that, in consideration of 26,500 dollars then paid by the purchaser, the receipt whereof the vendor acknowledged, the vendor assigned unto the purchaser all that piece or parcel of land being inland lot No. 556, then known as No. 104, Bonham Strand, to hold the same unto the purchaser for all the residue of the term created by and subject to the payment of the rent and the performance of the lessee's covenants and conditions reserved and contained in the Crown lease therein mentioned. And the purchaser thereby covenanted with the vendor that the purchaser would during the residue of the said term pay the rent and perform the covenants in the said Crown lease reserved and contained, and indemnify the vendor against all actions, claims, and demands on account or in respect of the non-payment of the said rent or the non-performance of the said covenants and conditions, or any of them. The indenture was executed by both parties and witnessed by Mr. Hodgson, a solicitor.

The vendor was at the date of this indenture the legal owner of the leasehold property expressed to be thereby assigned, and it cannot be disputed that the effect of the indenture was to pass the legal estate in this property to the person therein referred to as the purchaser. The only question is as to the identity of this person. The respondent (who will hereinafter be referred to as the " uncle ") contends that he is the person in question, and that the legal estate passed to him. The appellants, on the other hand, contend that the person in question is a person who will be hereafter referred to as the " nephew," and that the legal estate passed to the nephew.

There can be no doubt that parol evidence as to the identity of a party to a deed is always admissible, but in considering such evidence it is of paramount importance to bear in mind the indicia of identity afforded by the deed itself. In the present case these indicia are as follows : the person to be looked for is a person who (1.) is named Tong Shun ; (2.) resides at Victoria in the Colony of Hong Kong ; (3.) is a trader ; (4.) has paid the vendor 25,600 dollars ; and (5.) enters into a covenant with the vendor by signing, sealing, and delivering the indenture itself. The uncle's Chinese name may properly be rendered in English as Tong Shun, and he may, no doubt, be properly described as a trader. He also seems to have provided

the 26,500 dollars paid to the vendor. But he was not resident in Hong Kong when the indenture was executed. On the contrary he resided at Chicago, his only connection with Kong Hong being that he was or had been a partner in certain businesses carried on in the Colony. He certainly did not either personally or by a properly constituted attorney sign, seal, or deliver the indenture, or thereby enter into any covenant with the vendor. The nephew, on the other hand, has a Chinese name which may properly be rendered in English as Tong Shun: he resides in Victoria in that Colony; he is a trader. He paid the 26,500 dollars, though out of money provided by the uncle; he personally signed, sealed, and delivered the indenture, and he is the only person who could possibly be sued by the vendor on the covenant on the part of the purchaser therein contained.

The facts above stated taken alone would, in their Lordships' opinion, establish beyond controversy that the person in the indenture described as the purchaser was the nephew, and not the uncle; but there is one additional fact which has not yet been stated, and which is said to outweigh the other evidence, or at least to create such an ambiguity as to admit evidence of intention. As hereinbefore appears, both the uncle and the nephew have Chinese names, which may be properly rendered in English as Tong Shun. To the Chinese ear the names are, however, quite distinct, because their intonation is different. They are also distinct when written in Chinese characters, because these characters indicate tonal marks. It appears that the nephew in signing the indenture made use of the Chinese characters appropriate to his uncle's name, and not of those appropriate to his own name. It is said that this alone is sufficient to identify the uncle as the person in the indenture described as the purchaser. Their Lordships cannot accept that contention. A person who signs, seals, and delivers a deed of covenant cannot avoid liability under the deed by signing a name which he represents as, but which is not in fact, his own, nor can he saddle such liability on the person whose name he uses, unless he is the duly constituted attorney of such person. The nephew was not the duly constituted attorney of the uncle. He is therefore liable on the covenant, and to argue that while the person who covenants is the nephew the property passes to the uncle would be to contradict the

J. C. 1917

FUNG PING SHAN v. TONG SHUN.

deed, which clearly indicates that the property passes to the person who enters into the covenant. Even if the use of the Chinese characters appropriate to the uncle's name can be said to create an ambiguity to elucidate which evidence of intention is admissible, the uncle's position is in no way improved. For it is quite certain that the vendor intended to convey to the nephew whom alone he knew in the transaction. It is nihil ad rem to say that as long as the vendor got his money he did not care to whom he assigned the property. The nephew was not called as a witness, and his reasons for signing as he did are a matter of surmise; but, having regard to the fact that he was about to perpetrate a series of frauds, it is not improbable that he desired to be able to assure the uncle (as he subsequently assured him) that his (the uncle's) name had been used in the transaction while he himself remained in a position to mortgage or otherwise deal with the property.

Their Lordships think that the legal estate undoubtedly passed to the nephew, though, inasmuch as the transaction was one entered into on the uncle's behalf and with money provided by him, the nephew held the legal estate in trust for the uncle.

On November 12, 1909, the nephew created a legal mortgage on the property for 15,000 dollars. This was a fraud upon the uncle, for the mortgagee could, by virtue of the legal estate, rely on the plea of purchase for value without notice. On July 24, 1913, the nephew created an equitable mortgage on the property for 16,000 dollars. This was a fraud on the equitable mortgagee, whose interest would be postponed to the prior equitable estate of the uncle. On August 29, 1913, the nephew paid off the legal mortgage of November 12, 1909, and took a reconveyance of the legal estate. On the same August 29, 1913, the nephew created another legal mortgage on the property for 10,000 dollars. This mortgage was a fraud upon the uncle, over whom the mortgagee took priority by virtue of the legal estate. On December 11, 1913, the nephew paid off the equitable mortgage of July 24, 1913, and took a reconveyance of the mortgagee's interest.

On December 24, 1913, the nephew created an equitable mortgage on the property in favour of the appellants for 12,000 dollars. This was a fraud on the appellants, whose interest would be postponed to the prior equitable estate of the uncle, unless, indeed, the uncle

had been guilty of conduct which in a Court of Equity would preclude him from relying on his priority in time.

In this state of affairs the uncle, having very good reason to suspect misconduct on the part of the nephew, left Chicago and came to Hong Kong, desiring to protect his interest in the property. He found as a fact that the nephew had defrauded him by creating the legal mortgage for 10,000 dollars, which undoubtedly had priority to his own equitable interest, and had defrauded the appellants by creating in their favour the equitable mortgage for 12,000 dollars which, apart from any question as to the uncle's conduct, was undoubtedly postponed to the uncle's equitable estate. The uncle and the nephew thereupon, after consulting solicitors in Hong Kong, entered on June 20, 1914, into the following transaction: First the nephew paid off the legal mortgage and took a reconveyance of the legal estate. It does not appear whether the uncle or the nephew found the money for this purpose. Secondly, the nephew assigned the legal estate to the uncle subject to the indenture, creating the equitable mortgage, and the principal and interest thereby secured, the nephew covenanting with the uncle to pay him on demand the principal sum of 12,000 dollars and all interest or other moneys due by virtue of the indenture of mortgage, and the costs, charges, and expenses of paying off such mortgage and obtaining a reconveyance thereof. The second point their Lordships have to decide is the effect of these transactions on the position of the appellants. The uncle contends that they do not preclude him from setting up as against the appellants the equitable estate which he undoubtedly theretofore possessed. The appellants, on the other hand, contend that such equitable interest as the uncle had prior to the transactions in question is now gone, and that his sole interest is the legal interest which he expressly takes subject to the appellants' equitable mortgage.

In considering these rival contentions there are two points which must be borne in mind. In the first place, whatever the nephew does in carrying out the transactions in question must be taken as done by the direction of the uncle, the party beneficially interested. In the second place, the position of an equitable mortgagee may be improved by transactions to which he is not a party. Where a prior mortgage is paid off by the owners of the property the position of a

J. C. 1917

FUNG PING SHAN v. TONG SHUN.

puisne equitable mortgagee is improved, although the circumstances were such that the party taking the reconveyance might, had he so chosen, have kept the mortgage alive in his own favour, so as not to benefit the puisne mortgagee. Even in the case of the creation of an equitable charge, it is not necessary that the person in whose favour the charge is created should be a party to the transaction. A conveyance by A. to B. subject to a charge in favour of C., creates such a charge, if it be the intention of the parties, even though C. be not himself a party to the transaction.

If these points be borne in mind and attention be paid to the indenture by which the nephew conveyed the legal estate to the uncle, it is in their Lordships' opinion reasonably clear that the effect of the transaction was, and was intended to be, that for which the appellants contend. This indenture contains a recital of the appellants' mortgage, and no recital as to its being postponed to the uncle's equitable estate. It also recites a request by the uncle to the nephew to assign the property to him subject to the appellants' mortgage, and to enter into the covenant thereinafter contained, namely, the covenant to pay the uncle on demand the principal and interest due on such mortgage. What conceivable consideration could there be for such a covenant, unless the uncle intended to give the appellants priority in respect of their mortgage over his own equitable estate ? And how can the uncle now assert such equitable estate against the appellants without destroying this consideration ? Again, the conveyance is expressed to be subject to the appellants' indenture of mortgage and to payment of the principal and interest thereby secured, and not subject to any charge created by this indenture which might take effect in priority to the uncle's equitable estate, as would have been the case had the uncle intended to set up such estate against the appellants. Lastly, the nephew covenants to pay the uncle, on demand, what is secured by the appellants' mortgage, and not, as would have been the case if the uncle's contention be correct, to pay these moneys to the appellants and indemnify the uncle's property for any claim to a charge in respect thereof.

In their Lordships' opinion the effect of these transactions was that the uncle, instead of his equitable estate ranking in priority of appellants' mortgage, took the legal estate subject to the appellants'

mortgage in consideration of the nephew covenanting as above mentioned. The uncle's prior equitable estate, being co-extensive with the legal estate which he was acquiring, would prima facie merge in such legal estate : *Selby* v. *Alston* (1) ; *In re Douglas* (2) ; *In re Selous.* (3) He might have kept it alive as against the appellants, but he deliberately elected not to do so, and the result is that the appellants can claim the benefit of the transaction, although they were not parties to it.

Under these circumstances it is unnecessary to deal with the question whether the uncle had or had not been guilty of conduct disentitling him in a Court of Equity to set up his prior equitable estate as against the appellants' equitable mortgage.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs here and in the Court below, and that the order of the trial judge should be discharged, and the action in which the appeal arises be dismissed with costs.

Solicitors for appellants : *Gibson & Weldon.*
Solicitors for respondent : *Sharpe, Pritchard & Co.*

(1) (1797) 3 Ves. 339. (2) (1884) 28 Ch. D. 327.
(3) [1901] 1 Ch. 921.

[PRIVY COUNCIL.]

J. C.*
1917
Dec. 11.

THE HILLEROD.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Neutral Ship—Contraband Cargo—Neutral Port of Delivery—Enemy Destination—Knowledge of Shipowner.

A neutral ship carrying to a neutral port a contraband cargo which has an ultimate enemy destination is liable to condemnation if the shipowner has knowledge that the cargo is contraband so destined.

Knowledge of the destination may be inferred if the shipowner, knowing facts which would cause a reasonable person to suspect the intended destination, refrains from making inquiries.

The Hakan (ante, p. 148) applied.

APPEAL from a judgment of the President of the Probate, Divorce, and Admiralty Division (in Prize).

The Danish steamship *Hillerod*, bound from Philadelphia, U.S.A., to Trondhjem and Gothenburg with a cargo of lubricating oil, was stopped at sea and directed to proceed to Kirkwall, where, on November 16, 1915, the ship and cargo were seized. Lubricating oil was declared to be absolute contraband on March 11, 1915. A writ was issued claiming the condemnation of the ship and cargo.

The cargo was claimed by J. Westerberg, a Swede by birth but naturalized in the United States, and being the United States consular agent at Malmö in Sweden. His name appeared upon the bills of lading as consignee, and he purported by the charterparty of the ship to be the charterer. Brix-Hansen & Co., of Copenhagen, claimed the ship as owners.

The President (Sir Samuel Evans), by his judgment delivered on August 22, 1916, condemned both cargo and ship. He found upon the facts that the cargo did not belong to Westerberg, but that it had been acquired and shipped by Germans and was destined for Germany. He condemned the ship upon two grounds: First, applying the rule which he laid down in *The Maracaibo* (1), because

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD WRENBURY.

(1) [1916] P. 284.

the contraband goods exceeded half the entire cargo, and the shipowners were consequently to be presumed to be parties to the ulterior destination. Secondly, because he found upon the facts that Brix-Hansen & Co. were directly associated with Westerberg in an attempt to convey absolute contraband to the enemy, the case presented being an attempt of a glaring character to mislead the Court.

Both Westerberg and Brix-Hansen & Co. appealed.

1917. Nov. 8, 9. *L. C. Thomas*, for the appellant Westerberg. The evidence established that Westerberg was the owner of the cargo and did not show that it had an enemy destination.

Sir Erle Richards, K.C., and *C. R. Dunlop*, for the appellants Brix-Hansen & Co. The rule stated in art. 40 of the Declaration of London and applied by the President, namely, that a ship is liable to condemnation if more than half of her cargo is contraband, was discussed by the Board in *The Hakan* (1) and was not accepted as being a rule of international law. The principle adopted by the Board in that case, namely, that knowledge is sufficient if the goods form a substantial part of the cargo, is not applicable where, as in the present case, the voyage is to a neutral port. Under those circumstances it must be proved that the shipowner was a party to the enterprise. If knowledge of the destination is sufficient, it must be directly established by the evidence ; a shipowner cannot be presumed to know the destination of the goods after they have reached the port of delivery. Prior to the decision of the President in *The Maracaibo* (2), which he followed in the present case, the only recorded instance of a neutral ship condemned for carrying contraband cargo which was confiscable upon the continuous voyage principle is *The Doelwijk* (3), a decision of the Italian Prize Court. The question was referred to in the United States in *The Bermuda* (4), a case of blockade. In *The Ebenezer* (5), a continuous voyage case, the ship was released and allowed freight and expenses. *The Mashona* (6) was really a case of trading with the enemy. Here

(1) Ante, p. 148.
(2) [1916] P. 284.
(3) De Marten's Receuil Général, 2nd series, vol. 28, p. 66.
(4) (1865) 3 Wall. 514.
(5) (1806) 6 C. Rob. 250.
(6) (1900) 17 Cape S. C. 135.

J. C. 1917 THE HILLEROD.

the evidence did not establish that the shipowners were parties to the attempt to supply the enemy, nor did it affirmatively prove that they had knowledge that there was that intention.

Sir Frederick Smith, A.-G., and *D. Stephens*, for the respondent, the Procurator-General. The evidence clearly proved that the cargo was really bought for the enemy and destined for Germany. The rule laid down by the Board in *The Hakan* (1) that knowledge in the shipowner is sufficient applies equally to a case of continuous voyage. That view is supported by the observations in *The Bermuda* (2), and there is no authority to the contrary. Upon the facts proved and the necessary inferences it is clearly established that the shipowners well knew that the cargo was destined for the enemy.

[They were stopped.]

Sir Erle Richards, K.C., replied.

Dec. 11. The judgment of their Lordships was delivered by

LORD SUMNER. On November 4, 1915, the Danish steamship *Hillerod*, bound from Philadelphia to Trondhjem and Gothenburg with a cargo of lubricating oil, was stopped by H.M.S. *Teutonic* and was sent into Kirkwall. Ultimately both ship and cargo were condemned in prize by the learned President, from whose judgment the present appeals are brought by Mr. Joseph Westerberg, of Malmö, claiming the cargo, and Messrs. Brix-Hansen & Co., of Copenhagen, claiming the ship herself. The ship is now represented by a bond for 47,500*l.* In August, 1915, Messrs. Brix-Hansen & Co. resold her, about five weeks after they bought her, to Dampskibsselskabet Atlanterhavet A/S, of Copenhagen, and they in turn resold her in about two months to Messrs. Finn Friis and C. O. Lund, of Drammen, who gave the bond. Her price at the end of June, 1915, was 30,750*l.*

The *Hillerod* was a steamer of 2942 tons gross and 1913 net, twenty-three years old, built at West Hartlepool and recently Greek-owned. In addition to documents relating to the ship there were found on board of her, when she was detained, a charterparty, captain's copies of two bills of lading, a manifest, and a certificate by the consignee of the cargo that it was purchased for consumption

(1) Ante, p. 148. (2) 3 Wall. 514, 554.

in Norway and Sweden and would not be re-exported directly or indirectly from Norway or Sweden: Lubricating oil was then an article of industrial consumption in both Norway and Sweden, but there was no lack of lubricants there. On the other hand, the shortage in Germany was very acute, particularly in the case of such oil as the *Hillerod* carried. Since the outbreak of the war its price in Germany had multiplied between seven and eight times. There can be no doubt that large quantities of lubricating oil imported into Norway and Sweden were being re-exported to Germany, or that the traffic, when successful, was lucrative and worth some risk to all concerned. In both bills of lading Mr. Joseph Westerberg was named as the consignee; one provided for the delivery of 1000 barrels, containing 49,615 gallons of refined lubricating petroleum, at Trondhjem, and the other for the delivery of 13,665 barrels, containing 680,504 gallons, at Gothenburg, in each case against payment of freight "on discharge in accordance with charterparty." The charterparty (which is not fully set out in the record) was in English, and was made between Mr. Westerberg and the Dampskibsselskabet Sjolland, of Copenhagen, for whom, apparently, Messrs. Brix-Hansen & Co. act, and in whose name the bill of sale was taken. It provided, rather ungrammatically, that the *Hillerod*, or substitute now lying at Liverpool, after having completed a voyage from England to Sweden and Denmark and return to England, should "proceed to one charterer's option, two loading ports between Boston and Philadelphia," and there load a full cargo of oil in barrels and proceed to Drontheim and thereafter to Gothenburg for discharge. The charterer had the option of cancelling the charter if the ship was not ready to load on or before October 1. The cargo was to be taken from alongside the steamer at the ports of discharge at merchant's risk and expense. The ship was to be consigned to the charterer's agents at the ports of discharge, and they were to pay the cost of discharging, pilotage, and all port charges, and to provide an agent for custom-house business at their expense. Lay days at port of discharge were to commence on the day following receipt by charterer's agents of captain's written notice of readiness, discharging in fifteen running days, Sundays and holidays excepted. If the cargo was not discharged within the stipulated time, the charterer was to pay demurrage at the rate of 100*l.* per running day. Bills of

J. C. 1917 THE HILLEROD.

lading were to be "issued to name of consignees" (though no consignee was named in the charter), and were not to be made out to order. The master was to have a lien on the cargo for all freight and demurrage. The charterer was to undertake to provide and forward certificate, duly legalized, from receivers of the cargo that no transhipment of the cargo will take place. Finally, the provision as to freight, which was inserted after the description of the voyage and the stipulation for delivery of the cargo as customary, ran as follows: "In consideration whereof, the vessel shall be paid freight as follows: lump sum, 300,000 kronor, Danish currency"; and there was a clause providing for cesser of the charterer's liability when the cargo was shipped.

Both Mr. Westerberg and Messrs. Brix-Hansen & Co. filed affidavits, the former in answer to interrogatories. Both disclosed a certain number of documents. Their admissions are remarkable, but their Lordships are inclined to think that their omissions are more remarkable still.

[Their Lordships' judgment then considered at length the documentary evidence as to the alleged purchase of the cargo for 40,000*l.* by Westerberg, who had a salary of 200*l.* a year and had engaged in no previous mercantile transaction. It appeared, inter alia, that H. C. Hansen, who purported to act as agent for Westerberg, in purchasing the oil had no written instructions from the latter, that Westerberg apparently had no information that the purchase had been made till after he purported to have paid 16,500*l.* for the charter freight of the *Hillerod*, and that he took no steps for the sale of the oil in Norway nor for its reception there. The judgment proceeded as follows:]

The case of Messrs. Brix-Hansen & Co. involves somewhat different considerations. The President gave judgment against them on two grounds. The first was that as their ship was carrying goods, made contraband by the Proclamation of March 11, 1915, and having an ulterior destination in Germany, the shipowners must be presumed to be parties to that ulterior voyage, since the goods amounted to more than half of the cargo. As to this topic the opinion of their Lordships has been recently expressed in the case of *The Hakan* (1), and it need not be pursued further. The

(1) Ante, p. 148.

President's second ground was that Messrs. Brix-Hansen & Co. were directly concerned and associated with Mr. Westerberg in attempting to carry absolute contraband to the enemy, and that the case was one of an attempt to mislead the Court of a glaring character. The evidence for this conclusion must now be examined.

Messrs. Brix-Hansen & Co. presented a petition to their Lordships for leave to adduce further evidence explanatory of some of the matters upon which the learned President had animadverted. Their Lordships intimated during the hearing that this petition could not be entertained. Some observations seem to have been made at the hearing by the appellants' counsel to the effect that the evidence for the Crown raised points for which the appellants were not prepared owing to lack of notice; but, whether there was any real grievance in this respect or not, no adjournment was asked for, as might and should have been done if further evidence was desired. The learned judge was struck by the unsatisfactory character of some of Messrs. Brix-Hansen & Co.'s evidence, and commented pointedly on the omissions. To permit them to make a general reply upon his judgment by filing fresh evidence on the hearing of the appeal would open the door to grave abuses. It cannot be doubted that, as intelligent men advised by competent English solicitors, they must have appreciated the points in their case, which would be the better for full explanation, and have known that, in the candour which they owe to the Court, it behoved them to keep back nothing which was relevant to the issue. A claimant cannot be allowed to say "My conduct may in some respects be ambiguous and my explanations may be chiefly marked by economy of statement, but so long as I leave matters involved in sufficient doubt nothing is proved to my detriment, for nothing definite can be proved. The Court may not be able to make out exactly what has happened. It is better not to supply the clue: 'Not proven' will serve my turn."

Messrs. Brix-Hansen & Co. are, however, entitled to say that when it comes to affecting them with knowledge or notice of the ulterior destination of the cargo this must be done upon consideration of matters which were before their minds. This, then, is the next question.

In what guise did Mr. Westerberg come to Messrs. Brix-Hansen &

J. C. 1917 — THE HILLEROD.

Co. in the first instance, and how did he comport himself? He was not known to them as a merchant, for he had had no previous mercantile transactions. As a social acquaintance or even as a subordinate official of the United States of America (with a salary of 200*l.* a year) he was hardly a person to whom, in the ordinary course of business, they would charter a ship at a freight of 16,500*l.* It is natural to expect that he came with some introduction, but as the evidence both of Consul Westerberg and Messrs. Brix-Hansen & Co. is silent on the point, it is natural also to infer that the introduction was one which it would do neither of them any good to mention. By June 23 the substance of the transaction had been agreed. No difficulty was anticipated in framing the general terms of the charter, and the matter might well have been conducted by post. Nevertheless, on June 24 Mr. Westerberg returned from Malmö to Copenhagen. What for? His purpose appears to have been twofold. One was merely to obtain an option to discharge at a further port or ports for a suitable additional freight; the other was to undo to his own disadvantage the important stipulation relating to the lump-sum freight, which, as it stood, was in his favour.

The result of the consul's visit on the latter point was this. He paid over then and there in cash on June 24, 16,500*l.*, which he need not have paid till the end of September. If it was regarded as a loan, he did not think fit to ask for any express promise to repay it, or any definition of the event in which the money would be repayable. It is true that he got not only a receipt for his money but also security, but the security consisted of the simultaneous deposit of "the ship's insurance policy," a policy, therefore, under which there might never be any insurable interest, since the ship was one which, at that time, Messrs. Brix-Hansen & Co. had not even contracted to buy. If Messrs. Brix-Hansen & Co. failed to buy this ship and exercised their right under the charter to tender a substitute, this policy would be no security and of no use to him; if they bought it, but utilized the ship in some other employment, in which the ship took no harm, the policy would be a security of no value, for there would be no claim upon it. As it happened Mr. Westerberg's 16,500*l.* came in very conveniently for Messrs. Brix-Hansen & Co. when they bought the ship, afterwards renamed the *Hillerod*, as they did a little later. The price paid was 30,750*l.* Thus on her first charter

their new purchase would bring them in 53⅔ per cent. of her cost, and their new customer put them in funds to that extent three months before any freight was payable for the modest consideration of 5 per cent. on the amount of it. They, for their part, were free to complete her current voyage and to take a cargo outwards for their own account, and it is difficult to suppose that the freight so earned would not exceed the 200*l.* for which they would be liable as interest, nor is there one word in the evidence to show that Mr. Westerberg ever got, or even asked for, his 200*l.* at all. It must have seemed to Messrs. Brix-Hansen & Co. uncommonly good-natured of the consul.

When Messrs. Brix-Hansen & Co. came to draw up the charter, which was to be one of the documents carried on board the vessel, it was so drawn up as to express the real bargain only loosely. It was dated June 22, and chartered the *Hillerod*, "or substitute," though the *Hillerod*, and nothing but the *Hillerod*, had been the subject of the negotiation. It omitted to mention that in addition to Trondhjem and Gothenburg there were options for other ports, of course ports in Sweden, and it represented that the freight was not yet paid, though it had been paid already. It is not necessary that the Court should be able to see for itself precisely how these discrepancies might subserve the shipowners' interests, if any question with captors should arise. It is for the shipowners to explain the matter. They may reasonably be supposed to have seen, or to have thought they saw, something to be gained by these departures from accuracy.

When Messrs. Brix-Hansen & Co. thought that the *Hillerod* was nearing the United States they wrote to the captain, under date September 16, enclosing the charter and pointing out that her ports of discharge were Trondhjem and Gothenburg. They said nothing about the option for further ports, of which the captain was apparently ignorant. It is true that, according to Mr. Westerberg, this option was abandoned by him four days later; but if the transaction was not a sham, Messrs. Brix-Hansen & Co. on September 16 were leaving their captain in the dark as to the charterer's right to send the vessel to a further port and his obligation to pay further freight, and were thus preparing for dispute and delay. The natural inference is that at any rate the option for additional ports, though

J. C. 1917 THE HILLEROD.

given by them in writing by a confirmatory letter dated July 17, was in fact fictitious.

It is impossible to avoid some misgiving also as to the truthfulness of the alleged prepayment of freight. The 16,500*l.* may have been paid not as freight, but as a loan to enable the *Hillerod* to be bought at all. At any rate, in their letter of instructions to their captain, Messrs. Brix-Hansen & Co. told him nothing about this prepayment of freight, nor did Messrs. Flint, Goering & Co., of Philadelphia, when they wrote to him on September 15 that his owners had instructed them to look after the outward business of his ship. If the captain acquainted himself with the contents of his charter, as his owner's letter told him to do, he would see that it was his business to refuse to sign bills of lading unless they reserved at least 300,000 kronor, payable on delivery of the cargo, and to exercise his lien on the cargo at ports of discharge until that sum was paid, a course which should greatly have upset the consul. This was in substance what he did in America. How, again, did it come about that Kuhn Loeb & Co. (1) were content with bills of lading under which, apparently, 300,000 kronor were payable in Scandinavia ? Since no correspondence is forthcoming or accounted for, their instructions must have come from Mr. H. C. Hansen by word of mouth. Either Mr. Hansen did not know of the prepayment or else he forgot to tell them. Consul Westerberg's imports of oil into Scandinavia, strictly for Scandinavian consumption, seem, even for a first essay, to have been loosely conducted. It is equally difficult to understand why, if their entire chartered freight was prepaid in June, before the voyage began, Messrs. Brix-Hansen & Co. were at the pains and expense to insure it against marine risks for 100,000 kronor, which is what they certify that they did in a statement signed by them on December 22, 1915. Their office seems to have overlooked or to have misunderstood the transaction.

There were at this time two kinds of importation into Scandinavia, one as well known as the other—namely, importation for

(1) Kuhn Loeb & Co. were New York bankers concerned in financing trade with Germany and having two partners associated with a firm at Hamburg. They had advanced the invoice price of the oil (117,783 dollars) and the insurance premiums (9562 dollars), taking the bills of lading as security.

Scandinavian consumption only, and importation for ulterior transmission to Germany. The former was matter of course and involved no mystery. The latter had its perils, but also its commensurate profits, and mystery was one of its natural incidents, for no doubt the less the carrier could manage to know about it the better for him. In the absence of explanations from Messrs. Brix-Hansen & Co., which at the proper time they might have offered but did not, the conclusion from the facts is clear that, as reasonable men, they knew that this business was not the ordinary kind of importation, and if they knew no more it was because they did not need and did not choose to ask questions. Even that knowledge is enough.

Their Lordships have no doubt that this cargo of contraband had an ulterior destination in Germany and that, when they carried it, Messrs. Brix-Hansen & Co. were fully alive to the fact.

As for Consul Westerberg, their Lordships entertain no doubt upon the evidence that he never was the owner of the cargo; that he was Mr. H. C. Hansen's agent and not his principal; the he lent for hire his respectable name and office as bonnet to cover a traffic the nature of which must have been apparent to him; that he did as he was told, took what was given him, and concerned himself no further in the matter.

Their Lordships will accordingly humbly advise His Majesty that these appeals should be dismissed with costs.

Solicitors for appellant Westerberg: *Hewitt, Woollacott & Chown.*
Solicitors for appellants Brix-Hansen & Co.: *Thomas Cooper & Co.*
Solicitor for respondent: *The Treasury Solicitor.*

J. C.*
1917
Dec. 13.

[PRIVY COUNCIL.]

THE ANGLO-MEXICAN.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Commercial Domicil—Neutral Partner in Enemy Firm—Goods Shipped before War.

The commercial domicil of a neutral in an enemy country imposes enemy character upon his property or interest in the business which he there carries on. If upon the outbreak of war he wishes to avoid the consequences of that domicil he must within a reasonable interval discontinue, or dissociate himself from, the business. If goods are captured at sea before a reasonable interval from the outbreak of war has elapsed the Prize Court in a proper case will take notice of a discontinuance or a dissociation after the capture, and will even adjourn the proceedings to give an opportunity for a discontinuance or dissociation. A shipment of goods after the outbreak of war amounts to an election to continue, unless it is made without the privity of the claimant, or as a step in discontinuing the business or dissociating himself from it.

Decision of the Prize Court [1916] P. 112 reversed.

APPEAL from a judgment of the President of the Admiralty Division (in Prize).

The respondent, Frederick Mayer, a naturalized citizen of the United States, was a partner, to the extent of a one-fifth share, in Reis & Co., a firm which had its head office in Germany with branch offices in England and the United States. Reis & Co. shortly before the outbreak of war shipped from the United States in the British steamship *Anglo-Mexican* 273 bales of cotton sweepings of which they were the owners, the goods being deliverable as to part at Hamburg and as to part at Antwerp.

The *Anglo-Mexican* was diverted to the Port of London after the outbreak of war, and on September 4, 1914, the goods were there seized.

In proceedings in prize for the condemnation of the goods the respondent claimed the release to him of one-fifth of them or of

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, LORD WRENBURY, and SIR ARTHUR CHANNELL.

their proceeds. At the date of the hearing the respondent had taken no steps to dissociate himself from Reis & Co.

The President (Sir Samuel Evans), by his judgment delivered on March 30, 1916, allowed the claim; he condemned the remaining four-fifths of the goods.

The Procurator-General, on behalf of the Crown, appealed as to the release of the respondent's one-fifth share.

1917. Oct. 30; Nov. 1. *Sir Frederick Smith, A.-G., Sir Gordon Hewart, S.-G.*, and *J. H. W. Pilcher*, for the appellant. The respondent's interest in the goods should have been condemned. He had a commercial domicil in Germany in respect of his interest in Reis & Co.; upon the outbreak of the war he was to be deemed an enemy so far as related to that interest. By dissociating himself from the business within a reasonable time he could have put an end to his enemy domicil, but he did not do so. It is not sufficient that the claimant took no steps to facilitate the delivery to the enemy firm: *The Vigilantia* (1), and three unreported cases before the Lords of Appeal therein referred to; *The Bernon* (2); *The Gerasimo* (3); *The Friendschaft* (4); *The Cheshire* (5); *The San Jose Indiano* (6); *The Venus* (7); *The Manningtry.* (8) There is no authority to support the distinction drawn by the President between the position of a neutral and a British partner in an enemy firm; a similar distinction was disclaimed by the majority judgment in *The Venus.* (7) Further, in this case there was an attempt to deceive the authorities and a failure to disclose all the material facts. Those circumstances themselves are sufficient ground for condemnation: *The Eenrom* (9); *The Graaff Bernstorf* (10); *The Welvaart* (11); *The Amiable Isabella.* (12).

Inskip, K.C., and *C. J. Conway*, for the respondent. The charges of ill-faith and fraud are not supported by the evidence. The true rules as to the position of a neutral trader in a belligerent country are laid down in Pratt's Story, pp. 60, 61. The effect is that goods

(1) (1798) 1 C. Rob. 1.
(2) (1798) 1 C. Rob. 102.
(3) (1857) 11 Moo. P. C. 88.
(4) (1819) 4 Wheat. 105.
(5) (1865) 3 Wall. 231.
(6) (1814) 2 Gall. 268.
(7) (1814) 8 Cranch, 253, 283.
(8) [1916] P. 329.
(9) (1799) 2 C. Rob. 1, 8.
(10) (1800) 3 C. Rob. 109, 117.
(11) (1799) 1 C. Rob. 122.
(12) (1821) 6 Wheat. 1, 78.

J. C. 1917 THE ANGLO-MEXICAN.

shipped before the war by a neutral trading in an enemy country are not confiscable. No enemy taint attaches to the goods when they are shipped; their national character cannot be changed in transit according to the election of the owner. That view is supported by the judgment of the majority in *The Venus* (1) and by the unreported cases referred to in the judgment in *The Vigilantia*. (2) The national character of the goods at the date of capture is the test, but in ascertaining it regard must be had to the position at shipment.

Pilcher replied.

Dec. 13. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. The goods in respect of which this appeal arises were shipped at Savannah, U.S.A., shortly before the outbreak of the war, on the British steamship *Anglo-Mexican*. They were shipped by and at all material times belonged to Reis & Co., a German firm with its head office at Friedrichsfeld in Baden, but with branch offices at Boston, U.S.A., and at Salford in the United Kingdom. The firm consisted of four partners, Edwin Reis and Ludwig Reis, German subjects residing and carrying on the firm's business at Friedrichsfeld; K. B. Straus, a German by birth, but naturalized and resident in the United Kingdom, who was in charge of the Salford office; and the respondent Richard Mayer, also a German by birth, but naturalized and resident in the U.S.A., who was in charge of the Boston office. Richard Mayer's interest in the partnership concern was one-fifth share. The President has ordered the release to him of one-fifth of the goods in question or their proceeds, on the ground that he was a neutral subject domiciled and resident in a neutral country, though a partner in a German firm, and that the goods were shipped before the outbreak of the war. The Crown is appealing from this order.

The principles which ought to govern cases such as the present are not wholly free from doubt. It appears, however, reasonably certain that the question whether a particular individual ought to be regarded as an enemy or otherwise depends prima facie on his domicil, and domicil is, according to international law, a matter of inference from residence. Thus, if a neutral subject is at the commencement of or during the war to all appearance permanently

(1) 8 Cranch, 253. (2) 1 C. Rob. 1.

resident in an enemy country, he will be regarded as an enemy. By taking up his permanent residence in a country other than that of his birth, he submits himself to and takes the benefit of the laws of that country, and in effect becomes one of its subjects. If, therefore, while this state of things continues, goods belonging to him are seized as prize, such goods will prima facie be treated as enemy goods. But an acquired domicil may be abandoned, and if prior to the actual capture the owner has already done some unequivocal act indicating an abandonment of his acquired domicil in the country of the enemy, the goods will prima facie be treated as belonging to a neutral. It has been sometimes urged that neutrals, resident in a country which by the outbreak of hostilities becomes an enemy country, ought to be allowed a reasonable time after such outbreak to elect whether they will abandon or retain their acquired domicil. This point was discussed in *The Venus*. (1) In that case the majority of the judges of the Supreme Court of the United States decided against allowing any interval for election. It was not, they thought, desirable that a neutral after the outbreak of hostilities should be able for any interval, however short, to sit, as it were, on the fence ready to come down on either side according as it might prove to his advantage. The English authorities are not conclusive one way or the other. The point does not, however, fall to be determined on this appeal, for the respondent was not at the outbreak of hostilities permanently resident in Germany. His domicil was in the United States.

Again, it seems clear that a neutral wherever resident may, if he owns or is a partner in a house of business trading in or from an enemy country, be properly deemed an enemy in respect of his property or interest in such business. He acquires by virtue of the business a commercial domicil in the country in or from which the business is carried on, and this commercial domicil, though it does not affect his property generally, will affect the assets of the business house or his interest therein with an enemy character. But a neutral having such a commercial domicil in a country which becomes an enemy country on the outbreak of hostilities ought, according to the views taken by British Prize Courts, to be allowed a reasonable interval during which he may discontinue or dissociate himself from the business in question. If he has done this prior to the capture at sea

(1) 8 Cranch, 253.

J. C. 1917 — THE ANGLO-MEXICAN.

of any goods belonging to the business, such goods or his interest in them will not be confiscable. If he has not done this prior to the capture, but the Court is of opinion that a reasonable interval for this purpose had not then already elapsed, the Court will take notice of what he has done in that behalf since the capture, or will in a proper case even let the question of condemnation stand over to enable further action to be taken. If, on the other hand, he has already had a reasonable opportunity of discontinuing or dissociating himself from the business in the enemy country and has failed to take advantage of it, or if he has done some unequivocal act indicating an intention to continue or retain his interest in such business, the goods or his interest therein will be condemned as lawful prize.

It may happen that a neutral or the firm in which he is a partner has, besides the house of business in the enemy country, branch houses in other countries. In such a case nice questions may arise as to whether the captured goods ought properly to be regarded as appertaining to the enemy house or to one or other of the branch houses. A question of this sort came before their Lordships' Board in the case of *The Lützow* (1), in which judgment is about to be given, and the original claim put forward on the respondent's behalf in the present case appears to have been framed on the contention that the goods now in question appertained to the American or to the English branch of the business of Reis & Co., and not to their German branch. Had this claim been made out, the interest therein of the respondent would not have been confiscable as enemy property. The claim, however, in this form was abandoned in the Court below, it being admitted that the goods in question could not be regarded otherwise than as appertaining to the German house.

In support of the views above indicated their Lordships refer to *The Gerasimo* (2), where Lord Kingsdown, in delivering the opinion of the Board, states the general principle as follows: "The national character of a trader is to be decided for the purposes of the trade by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade,

(1) Post, p. 435. (2) 11 Moo. P. C. 96.

as a subject of the Power under whose dominion he carries it on and, of course, as an enemy of those with whom that Power is at war."

Their Lordships also refer to the following important passage in Mr. Justice Story's Notes (Pratt's Story, at pp. 60—61): "In general, a neutral merchant trading in the ordinary manner with a belligerent country, does not, by the mere accident of his having a stationed agent there, contract the character of the enemy. But it is otherwise, if he be not engaged in trade upon the ordinary footing of a neutral merchant, but as a privileged trader of the enemy, for then it is in effect a hostile trade. So if the agency carry on a trade from the hostile country which is not clearly neutral, *and if a person be a partner in a house of trade in an enemy's country*, he is, as to the concerns and trade of that house, deemed an enemy; and his share is liable to confiscation as such, notwithstanding his own residence is in a neutral country, for the domicile of the house is considered in this respect as the domicile of the partners. But if he has a house of trade in a neutral country, he has not the benefit of the same principle; for if his own personal residence be in the hostile country, his share in the property of the neutral house is liable to condemnation. However, where a neutral is engaged in peace, in a house of trade in the enemy's country, his property, so engaged in the house is not, at the commencement of the war, confiscated; but if he continues in the house after the knowledge of the war, it is liable, as above stated, to confiscation. It is a settled principle that traffic alone, independent of residence, will, in some cases, confer a hostile character on the individual."

If the principles thus laid down be applied to the facts of the present case, it would appear that the interest of Richard Mayer in the goods in question ought to be condemned by reason of his commercial domicil in Germany. He might, it is true, have avoided this result by taking steps within the reasonable interval allowed by law to dissociate himself from the enemy firm in which he was a partner. But it is not suggested that he took any such step or that such reasonable interval has not elapsed. On the contrary, it is admitted that since the outbreak of the war he has been actively engaged in the affairs of Reis & Co. in Germany.

The contention of the respondent is based entirely on the following

J. C. 1917 — THE ANGLO-MEXICAN.

consideration: The goods in question were shipped in time of peace. There could therefore be no enemy taint affecting them when the war broke out. Since the outbreak nothing has been done in respect of them by virtue of which they could have acquired an enemy character. The criterion of character is therefore personal domicil. It will be observed that this contention with regard to goods at sea at the commencement of a war entirely ignores the doctrine of commercial domicil as determining the character of the goods. It leaves the character of such goods to depend on personal domicil, subject to the question whether the owner has done anything to impress upon them or taint them with an enemy character. In other words, it creates an exception to the theory of commercial domicil, and deals with the excepted cases on different principles. Counsel for the respondent was unable to suggest, and their Lordships have been unable to find, any logical justification for such an exception. If it exists at all, it must be attributed, as counsel for the respondent attributed it, to an over-scrupulous desire on the part of our Prize Courts to protect neutral interests. Further, if the exception exists, the rule which allows a reasonable interval in which the neutral owner can discontinue his commercial domicil in the enemy country will be reduced within very narrow limits, if it is not abrogated altogether, for a neutral owner will, by shipping goods after the war, or by otherwise taking part after the war in the affairs of the enemy house of business, have elected to continue his commercial domicil in the enemy country, and so brought the interval to an end. Nevertheless, the exception is said to be supported by authority, and their Lordships will therefore proceed to consider the several authorities on which reliance is placed.

The three earliest authorities referred to are *The Jacobus Johannes* (1785), *The Osprey* (1795), and *The Nancy* (1798), all of them decided by the Lords Commissioners in Prize Cases. The decisions are unreported, but the printed cases and appendices which were before the Lords Commissioners are preserved in the Admiralty Library, and their Lordships have had access thereto.

In *The Jacobus Johannes* the goods in question belonged to a firm carrying on business in the Dutch island of St. Eustatius. The goods had been shipped from St. Eustatius on December 5, 1780, on board a Dutch vessel bound for Amsterdam and were deliverable

at Amsterdam. Hostilities between this country and Holland commenced on December 20, 1780. On February 3, 1781, St. Eustatius was occupied by His Majesty's naval forces. On February 4 the *Jacobus Johannes* with its cargo was captured at sea. The firm which owned the goods consisted of two partners, namely, Haason, a Danish subject, but domiciled in St. Eustatius, where he carried on the business of the firm, and Ernst, also a Danish subject, but domiciled at Copenhagen. Shortly after the occupation of the island by the British, Haason proceeded to wind up the firm's business and finally left the island in April, 1781. It is to be observed on these facts that Haason's personal domicil being Dutch at the date of capture he was prima facie, at any rate, an enemy. If according to the English as well as the American view of international law, he was not entitled to an interval after the commencement of hostilities in which he could abandon his acquired domicil, his share in the goods would in any event be confiscable. If he was entitled to an opportunity of abandoning his acquired domicil, the question would arise whether he had done so within a reasonable time. On the other hand, Ernst, who was domiciled at Copenhagen, could only be regarded as an enemy by virtue of the commercial domicil of the firm, and he was clearly entitled to a reasonable interval in which he might dissociate himself from the firm. The interest of Haason was condemned and that of Ernst released. It does not appear what were the reasons for this decision. It is quite possible that the case turned wholly on personal domicil, the doctrine of commercial domicil being yet undeveloped. It is also possible that, in the opinion of the Lords Commissioners, the connection of both partners with an enemy business had in fact been determined within a reasonable interval, and that such determination would justify the release of Ernst's interest, but would not improve the position of Haason, whose personal as well as commercial domicil at the date of capture was Dutch. Under these circumstances their Lordships fail to see how the case can be relied on as an authority for the alleged exception to the general rule.

In *The Osprey* the property in question was a ship employed in the Southern Whale Fishery with her cargo of whale-oil and whale-bone. She had left Dunkirk on her whaling adventure on May 24, 1792. War broke out between this country and France in February, 1793,

J. C. 1917 — THE ANGLO-MEXICAN.

and on May 15, 1793, the ship and her cargo were seized as prize. The ship belonged to three persons, all subjects of the United States of America, two of whom were domiciled at Dunkirk, and the third, one Rodman, was domiciled at Nantucket. The cargo belonged to the owners of the ship and the master and crew in shares, which were apparently settled by the custom of the fishery. Among the crew were other subjects of the United States, no doubt domiciled in America. The Lords Commissioners ordered a release of Rodman's share in the ship and cargo and of the shares in the cargo of the American members of the crew. The reasons for this decision are again unknown, but, as in the case of *The Jacobus Johannes*, the case may have turned entirely on personal domicil. It should be observed that there was really no commercial domicil in an enemy country, the whole adventure being a high seas adventure. Further, the whole adventure, except the return voyage, had apparently been carried out during peace, and had come to an end when the ship and cargo were seized as prize. There was in fact nothing from which, when the war broke out, the neutrals interested could dissociate themselves. Again their Lordships fail to see how this case can be relied upon as an authority for the alleged exception to the general rule.

In *The Nancy* the goods in question had been shipped early in July, 1793, a state of open war having existed between this country and France since February 14, 1793. The shipment was made at Port-au-Prince in the island of St. Domingo by Stephen Zaccharie, the cargo being consigned to Zaccharie, Coopman & Co., of Baltimore. It was not quite clear on the evidence whether the goods belonged to Stephen Zaccharie, and were deliverable to Zaccharie, Coopman & Co. on his account, or whether they belonged to Zaccharie, Coopman & Co. The partners in this firm were Stephen Zaccharie and two others, Coopman and Vochey. Coopman was an American by birth, and Stephen Zaccharie and Vochey, though French by birth, claimed to have been naturalized in the United States. All of them claimed to have an American domicil, but Coopman and Stephen Zaccharie were both of them in St. Domingo at the time of shipment, and also at and after the capture. The judge of first instance released the goods to Stephen Zaccharie, on the ground that they were at the time of capture his property and that he was an

American citizen. The Lords Commissioners reversed this decision, and condemned the goods as enemy property. It is not clear to whom they considered the goods to belong, but if they belonged to Stephen Zaccharie it is quite clear that he was at all material times actually trading in enemy territory; and if they belonged to the firm it is equally true that two of the firm were at all material times trading in the enemy country on behalf of the firm. In respect, therefore, of the goods in question there was, whoever was the owner and wherever such owner was personally domiciled, a commercial domicil by virtue of which the goods were confiscable. There could be no question of any reasonable interval for the owner to discontinue or dissociate himself from the trade in the enemy country, for the transaction originated after the outbreak and with full knowledge of the state of war. In this respect the case differed from *The Jacobus Johannes* or *The Osprey*, where the transaction originated in the time of peace. It has even less bearing than these cases on the point at issue.

The three cases of *The Jacobus Johannes*, *The Osprey*, and *The Nancy* were commented upon by Sir William Scott in *The Vigilantia*. (1) After mentioning *The Jacobus Johannes* and *The Osprey*, he says that from these cases a notion had been adopted that the domicil of the parties was that alone to which the Court had a right to resort. From this it appears that, according to the general opinion, both *The Jacobus Johannes* and *The Osprey* had turned entirely on the personal domicil of the claimants, the doctrine of commercial domicil being wholly ignored. But Sir William Scott proceeds to say of *The Nancy* that it had been decided on different principles, the Lords Commissioners distinguishing the former cases on the ground that they "were cases merely at the commencement of a war; that in the case of a person carrying on trade habitually in the country of the enemy, though not resident there, he should have time to withdraw himself from that commerce; and that it would press too heavily on neutrals, to say, that immediately on the first breaking out of a war, their goods should become subject to confiscation." Sir William Scott adds that it was expressly laid down in *The Nancy* that if a person entered into a house of trade in the enemy country in time of war, or continued that connection

(1) 1 C. Rob. 1, 15.

J. C. 1917 THE ANGLO-MEXICAN.

during the war, he should not protect himself by mere residence in a neutral country.

Sir William Scott had been counsel for one of the parties in *The Nancy*, and his account of what was said by the Lords Commissioners is no doubt based on personal knowledge. It is reasonably clear, in spite of a slight ambiguity in Sir William Scott's language, that the Lords Commissioners in *The Nancy* distinguished the two earlier cases on the ground that the goods in question in these cases had been shipped before the war, whereas in the case of *The Nancy* the shipment was after the commencement of hostilities. This was a perfectly legitimate ground of distinction, but it is a fallacy to suppose that a judge necessarily approves every case which he distinguishes from that with which he is himself dealing, and a still greater fallacy to suppose that he approves of it on any particular ground. The rule which Sir William Scott states to have been laid down in *The Nancy* is the rule by which an enemy character is imposed on goods by virtue of the commercial domicil of the owner, not a rule which leaves the personal domicil as the criterion of character, subject to a possible enemy taint imposed by the action of the owner. It is stated without exception. If Sir William Scott had considered that the Lords Commissioners were countenancing or even suggesting an exception to the rule, he would certainly have said so, more especially as cases within the exception would fall to be decided on principles independent of commercial domicil.

The President appears to have treated the cases above referred to as authorities in the respondent's favour, and says that the doctrines there laid down have been followed by America and this country ever since. He refers in particular to *The Antonia Johanna* (1), *The Friendschaft* (2), *The San Jose Indiano* (3), and *The Cheshire*. (4) These are all of them American authorities, which upon examination appear to support the general principle of the effect of a commercial domicil acquired in an enemy country by a person whose personal domicil is in a neutral country. They do not support the exception to the general principle for which the respondent contends.

In *The Antonia Johanna* (1) the goods in question were held to

(1) (1816) 1 Wheat. 159.
(2) 4 Wheat. 105.
(3) 2 Gall. 268.
(4) 3 Wall. 231.

have been shipped for and on account of a house of trade in the neutral country, and the case therefore fell to be decided on the personal domicil of the partners in the neutral house of trade. In *The Friendschaft* (1) the goods in question belonged to a house of trade established in the enemy country. They had been shipped during the war. The doctrine of commercial domicil is stated by Story J., and the goods were condemned. No exception to the rule is mentioned. In *The San Jose Indiano* (2) the authorities on which the doctrine of commercial domicil is based are discussed at some length. The cases of *The Jacobus Johannes*, *The Osprey*, and *The Nancy* are mentioned, but not as creating any exception to the general doctrine. Similarly in *The Cheshire* (3) there is a statement of the general doctrine, but no allusion to any possible exception.

With regard to the British authorities, their Lordships have failed to find any authority for the respondent's contention, unless it be *The Jacobus Johannes*, *The Osprey*, and *The Nancy*, and Sir William Scott's comments on them in *The Vigilantia*. (4)

In their Lordships' opinion these cases and comments afford a very slender support for the contention in question. It appears from the facts in each case that the point did not necessarily arise for decision. Each case is explicable without it having been raised or decided. The whole superstructure of the respondent's argument is ultimately based on what is said by Sir William Scott in *The Vigilantia*. (4) But as above indicated, this is quite consistent with the general rule deduced from the other authorities.

Under these circumstances their Lordships have come to the conclusion that there is no such exception to the general rule as that for which the respondent contends. A neutral owning or being a partner in a house of business in an enemy country has a commercial domicil in that country. This commercial domicil imposes an enemy character on his property or interest in such house of business. There is no question of any particular act on his part by which any particular goods belonging to him or his interest in any particular goods may be tainted. If, having such a commercial domicil in a country which by the outbreak of war becomes an enemy country, he desires to avoid the consequences entailed by such domicil, he may avail

(1) 4 Wheat. 105.
(2) 2 Gall. 268.
(3) 3 Wall. 231.
(4) 1 C. Rob. 1, 15.

J. C. 1917 — THE ANGLO-MEXICAN.

himself of the interval allowed by law to discontinue or dissociate himself from the business in question. Inasmuch, however, as goods at sea when the war commenced may be captured before such reasonable interval has elapsed, the Court will in a proper case take notice of a discontinuance or dissociation taking place after the capture, or will even adjourn proceedings in the Prize Court to give an opportunity for such discontinuance or dissociation. In the case of goods shipped after the commencement of the war, the circumstances of the shipment must be considered. The shipment may have been made by or with the privity of the claimant in the ordinary course of the business in the enemy country. In such a case the claimant will have elected to continue the business, and there will be a case for condemnation. Only if the shipment was made without the privity of the claimant or as a step in discontinuing or dissociating himself from the enemy connection can there be any question of their release. Such a case will be determined in the same way as like questions with regard to goods at sea when the war commenced. There is, in their Lordships' opinion, no principle upon which any such exception as that set up in the present case can be based. It is the duty of the Court to hold an even hand between belligerents and neutrals, and not to create in favour of the latter, and at the expense of the former, exceptions or exemptions not clearly justified by the principles of international law.

Their Lordships are of opinion that the respondent's interest in the goods in question ought to have been condemned for the reasons above stated. It therefore becomes unnecessary to deal with the second argument put forward on behalf of the Crown, namely, that which was based on the alleged attempt of the respondent to deceive the Court.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs, and the respondent's interest in the goods in question condemned accordingly.

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for respondent: *Oppenheimer, Blandford & Co.*

[PRIVY COUNCIL.]

THE LÜTZOW.

J. C.*
1917
Dec. 13.

ON APPEAL FROM THE PRIZE COURT, EGYPT.

Prize Court—Commercial Domicil—Branch of Neutral Company in Enemy Country—Goods shipped before War—Purchase for Branch in Allied Country—National Character.

The appellants, a company registered in the United States and having its head office there, had branches at Hamburg and in Japan. In pursuance of instructions from the Japanese branch the Hamburg branch bought for them aniline dyes from named German manufacturers and shortly before the outbreak of the war shipped the goods to Japan in a German ship. The Hamburg branch paid for the goods with the proceeds of a draft upon the Japanese branch, the draft being negotiated with bankers upon the security of the bills of lading. They invoiced the goods at cost price, the profits upon the transaction being divisible between the branches according to arrangements made by the appellants. The ship and goods were captured at sea :—

Held, that the goods were not so connected with the Hamburg branch of the appellants' business as to render them liable to condemnation as enemy property.

APPEAL from a judgment of the Prize Court (Egypt) delivered on August 16, 1916.

The appellants, the American Trading Company, a company registered in the United States, appealed from a judgment of Cator J., sitting in prize at Alexandria, whereby goods shipped in the German steamship *Lützow* had been condemned as enemy property.

The facts are stated in the judgment of their Lordships.

1917. Oct. 23, 25. *C. R. Dunlop* and *Stenham*, for the appellants. First, even if the appellants in respect of their Hamburg business were to be deemed as enemies, the goods were not liable to condemnation. Whether the Hamburg branch was agent for the Japanese branch or was the purchaser, it had no property in the goods at the date of seizure. If ownership is to be attributed to any

* *Present :* LORD PARKER OF WADDINGTON, LORD SUMNER, LORD WRENBURY, SIR SAMUEL EVANS, and SIR ARTHUR CHANNELL.

J. C. 1917 THE LÜTZOW.

particular branch the goods belonged to the Japanese branch. The goods were not so connected with the Hamburg branch as to be confiscable: *The Portland* (1); *The Venus* (2); *The Manningtry* (3); *The Eumæus.* (4) Secondly, the Hamburg branch had ceased to have an enemy character. Commercial domicil depends upon intention: *The Indian Chief* (5); *The Dree Gebroeders.* (6) The directors of the appellant company bona fide resolved to discontinue their Hamburg branch upon the outbreak of the war; that was an expression of their intention. They entered into no fresh business and the liquidation was conducted with reasonable despatch. The time taken in liquidation is only material in so far as it throws a doubt upon the bona fide character of their intention.

Sir Gordon Hewart, S.-G., and *A. T. Carter*, for the respondent. The appellants had a commercial domicil in Germany in respect of their Hamburg business. They could only free themselves from the enemy character attaching in that business by intention to discontinue it accompanied by due diligence in carrying out the discontinuance: *The Vigilantia* (7); *The Jonge Klassina* (8); *The Venus.* (2) The goods were bought and shipped by the Hamburg branch; they formed part of the assets of that branch, which had a share in the profit to be derived from the transaction. The goods were, therefore, liable to condemnation.

Dunlop replied.

Dec. 13. The judgment of their Lordships was delivered by

SIR ARTHUR CHANNELL. This is an appeal against a decree dated August 11, 1916, of His Britannic Majesty's Prize Court in Egypt, rejecting the claim of the appellants to certain goods seized as prize on board the German steamship *Lützow*, and pronouncing that the goods belonged at the time of seizure to a house of business in an enemy country and as such were liable to confiscation, and condemning the same as good and lawful prize.

The American Trading Company, which claimed the goods as owner, is an American company registered in the State of Maine in

(1) (1800) 3 C. Rob. 41, 44.
(2) (1814) 8 Cranch, 253, 283.
(3) [1916] P. 329.
(4) (1915) 1 Br. & Col. P. C. 605.
(5) (1800) 3 C. Rob. 12, 20.
(6) (1802) 4 C. Rob. 232.
(7) (1798) 1 C. Rob. 1.
(8) (1804) 5 C. Rob. 297, 302.

the United States of America. The head office of the company is in New York. Its head and direction is there, and its shares are held by subjects of the United States, except a few held by British subjects. It has branch offices in other countries. These branches are not incorporated separately, and are in no way separate firms or entities. They are merely places where the business of the company is carried on by employees of the company. The branches kept, of course, separate accounts of the transactions of the branch, and they seem also to have kept some account or estimate of the profits made, or conventionally assumed to have been made, by the work of the branch. This was mere book-keeping, for all profits earned anywhere were for account of the company, and all property was the property of the company. Such accounts of profits are usual and almost necessary in such cases. The head office requires to know how the branches are doing to guide them as to continuing and developing or discontinuing the branches, and very commonly, and possibly in the present case, the managers of the branches are remunerated by a percentage on the profits of the branch. The company had and have a branch at Yokohama, and before the war had one at Hamburg. On the outbreak of the war something was done in the direction of discontinuing the business at Hamburg, and one of the questions in the Court below and on the appeal is as to the effect of what was so done. The learned judge below has held on the facts proved before him that the appellants had not acted with reasonable promptitude in winding up their business at Hamburg which they professed to be doing, and that they must be considered to have been after the commencement of the war and at the date of the seizure of the goods and down to the time of his judgment continuing to have a house of business and to trade in Germany.

This finding, if it stands, brings the appellant company within a rule of international law—that, although it is a neutral company, it is liable to be treated as an enemy for some purposes, and that some, although of course not all, of its property may be treated as enemy property. When the present appeal was argued there was pending before the Board the appeal *The Anglo-Mexican* (1), which appeared to involve some questions arising on that rule, and their

(1) Ante, p. 422.

J. C. 1917 THE LÜTZOW.

Lordships have reserved judgment in this case until that case was disposed of. That judgment has just been delivered, and various points on the rule in question have been dealt with. The principal question on this appeal is, however, one which in that case was abandoned, namely, whether the goods of the appellants seized on the *Lützow* come within the category of goods which are liable to be condemned as enemy property by reason of the appellants having so continued to carry on business in Germany. In the cases which establish the rule the property liable to be treated as enemy property is described in words which vary somewhat, and which are often rather vague.

In *The Portland* (1) Lord Stowell speaks of "the property of a merchant embarked in that trade," meaning the trade in the enemy country, and further down in the judgment says (2): "I know of no case, nor of any principle, that could support such a position as this; that a man, having a house of trade in the enemy's country, as well as in a neutral country, should be considered in his whole concerns as an enemy's merchant, as well in those which respected solely his neutral house, as in those which belonged to his belligerent domicil."

Again, in *The Jonge Klassina* (3): "A man may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries."

In *The Venus* (4) there occur in the judgment of the majority the expressions "so much of the property concerned in the trade of the enemy as is connected with his residence," and again "as to property engaged in the commerce of the enemy"; and Marshall C.J., at the commencement of his dissenting judgment in that case, says that he concurred in so much of the judgment of the majority "as attaches a hostile character to the property of an American citizen continuing, after the declaration of war, to reside and trade in the country of the enemy." Recently Sir Samuel Evans in *The Manningtry* (5) said: "if a person be a partner in a house of trade in an enemy's country, he is, as to the concerns and trade of that house,"

(1) 3 C. Rob. 41.
(2) Ibid. 44.
(3) 5 C. Rob. 297, 302.
(4) 8 Cranch, 253, 280, 288.
(5) [1916] P. 329, 340.

to be deemed an enemy, for which he refers to Pratt's edition of Story, 60, where that expression is to be found. Wheaton (Dana's edition, s. 334) states the proposition thus: "The property of a house of trade established in the enemy's country is considered liable to capture and condemnation as prize." Hall, in his Treatise on International Law, following apparently *The Jonge Klassina* (1), states the proposition as to a trader in two countries that he must be regarded as a belligerent or a neutral, according to the country in which a particular transaction has originated.

In order to see whether the goods seized on the *Lützow*, and which were beyond doubt the property of the appellant company, were the concerns of the branch business of the appellants at Hamburg as to be liable, upon the assumption that the business of that branch was continued after the war began, to be condemned as enemy property, it is necessary to see what is to be found in the record as to the actual dealings with those goods.

They consisted of a large number of packages containing aniline dyes made in Germany. The Japanese branch sent directions from time to time to the Hamburg branch telling them to order these goods from named German manufacturers, the Chemikalien-Werk Griesheim Limited Company, Griesheim. Specimens of the various documents—that is, the so-called orders given by the Japan branch, the confirmations of those orders by the Hamburg house, the invoices by the Chemikalien-Werk to the Hamburg house, the invoices by the Hamburg house to the Japanese house, and the bills of lading —are in the record. As the documents selected to be copied are specimens only, the exact dates of each of the orders do not appear, but they seem to have been sent off by Japan in November and December, 1913, they were confirmed by Hamburg in due course, and the orders were given to the Chemikalien-Werk, who apparently executed the orders by about June, 1914, and the goods were shipped on the *Lützow* by July 13, 1914, the date of the bills of lading. The so-called orders were in a form in which they might have been, if the branches were separate and independent firms or companies, carrying on separate trading, but doing business together on joint account, according to a course of business established between them —in fact, of course they operated merely as directions by one

(1) 5 C. Rob. 297.

J. C. 1917 — THE LÜTZOW.

employee of the company to another as to work to be done for their common employers. They directed that the goods should be "invoiced at cost for division of profits according to new rules," and stated that "financing was required for months" (*sic* in the specimen in the record), and that the drafts by Hamburg on Japan were to be arranged accordingly. The "new rules" referred to are not copied in the record or explained by any evidence. They doubtless were rules of the company providing for the mode of making out the estimate of the profits of each branch in cases where business was done partly by one branch and partly by another. It is not quite easy to see from the documents copied on the record how much is the original document and how much a note subsequently made on it, nor is it easy to trace the sums paid, as the documents copied are specimens only; but it seems that the Chemikalien-Werk were paid on July 27, 1914, for the goods shipped on July 13, 1914, by money raised by negotiating with the Hong Kong and Shanghai Banking Corporation a draft dated July 27, 1914, drawn by the appellants' Hamburg branch on their branch in Japan, payable to the order of the bank at four months' sight. This was done under a letter of credit obtained either by the Japanese branch or by the head office of the appellants; and as security to the bank for the acceptance and payment by the Japanese house of this draft the bills of lading, dated July 13, were indorsed to and handed to the bank. As this was all in time of peace, there is no question here of any trading with an enemy in respect of these goods, nor is it possible to say that the goods were in any way tainted. It is only as enemy property at the date of the capture that they can be condemned, if at all.

The draft and the bills of lading arrived in Japan in September, and on September 28 the draft was accepted. On either October 6 or 8 (the dates of the indorsements as copied in the record are not quite clear) the bank handed to the appellants' Japanese branch the bills of lading, indorsing them to their order, in exchange for a letter of trust agreeing to hold the bills of lading and the goods if received, and their proceeds if sold in trust for the bank, until the acceptance was met. At some time or other this letter of trust was cancelled, but it seems quite clear that on October 15, when the *Lützow* was captured, the bills of lading duly indorsed were in Yokohama in the actual custody of the bank and at the disposal of the appellants'

branch there subject only to the bank's lien, or else they were in the actual possession of the branch on the terms of the letter of trust. It has not been suggested, and could not be maintained, that the acceptance of the draft drawn on the Japanese branch by the Hamburg branch, although after the war began, could be a dealing with the enemy by an ally of Great Britain which would justify the condemnation of the goods. It was obviously a dealing only with the bank, who were the holders both of the draft and of the bills of lading, and, moreover, the transaction was done in pursuance of engagements entered into bona fide before the war.

On the outbreak of war the appellants were entitled to save themselves from being treated by Great Britain and her Allies as an enemy in respect of their German branch by promptly ceasing to carry on trade in Germany, and if for the purpose of doing so they removed from Germany by sea any property they then had in Germany it would during its transit for that purpose be free from seizure and condemnation as enemy property. They had, of course, similar rights as to their Japanese branch if they had been afraid of being treated by Germany as an enemy in respect of that, but this risk they seem to have disregarded.

The executive committee of the appellants did on August 25 resolve to close the Hamburg office "as soon as it can be done without serious loss on the company through liquidation of stocks on hand, &c." They acted on this resolution so far as not to do any new business except in one small transaction said to have been done by the manager by inadvertence and in contravention of orders of his superiors. They proceeded, however, very slowly in the liquidation of their affairs, being apparently afraid of the serious loss they had contemplated as possible. They seem to have removed nothing from the country. They did materially reduce their stock, but at the date of the seizure of the goods in question, and at the time (August 11, 1916) when the judge of the Prize Court delivered his final judgment in this case, after having adjourned it for further evidence of what the company were doing; and having got that further evidence they were, in the opinion of the learned judge, still carrying on trade in Germany to some extent. That being a finding of fact, their Lordships would not, even although the same materials are before them as were before the learned judge, interfere with it

J. C. 1917 THE LÜTZOW.

unless it were in their opinion clearly wrong. On the whole their Lordships are inclined to the opinion that the view of the learned judge below on this point was right, but, having regard to their opinion on another point of the case, it is not necessary to decide this. This judgment is based on the assumption that the judge was right in his view that the appellants had not so acted as to free themselves from the imputation of continuing to trade in Germany after the declaration of war. Does that make the goods on the *Lützow* goods which the appellants must be considered to own as Germans and not as neutrals? The goods were of course not the property, and never had been the property, of the Hamburg branch as such in fact, and, even, if that branch had been a separate firm or entity, it is by no means clear that these goods, bought as they were on directions coming from Japan, which in that case would have been properly called orders to buy for Japan, would ever have been the property of that firm at Hamburg. The directions they received were specific, both as to the goods to be bought and as to the firm from which they were to be bought. They might have been merely agents to buy, and the property might have vested, not in them, but in their principals. The adventure was the selling in Japan of goods to be obtained from Germany, for which the Japanese agents of the appellants had either found purchasers or had ascertained that there was a market. The first origin of the matter was in Japan. The agents of the appellants who carried on trade for the appellants in Hamburg under the name of a branch were certainly the persons who arranged the terms of purchase from the Chemikalien-Werk, and it was by their act that the property in the goods became vested in the appellants, but they had nothing further to do with the matter. They arranged as agents the details of the finance, but advanced no money, acting under a letter of credit not obtained by them; and before the war broke out they had parted with all control over the goods. They had indorsed the bills of lading and handed them over, not, indeed, with the intention of passing their property in the goods, for they never had any property, but with the intention of putting a final end to their part of the transaction, subject only to some book-keeping credit in their favour of a share of profits in consideration of the work they had done.

It has been suggested that a test whether these goods were

"concerns" of the German branch would be whether they would be assets of the branch if it had become bankrupt at the date of the seizure. But on the facts the goods could not have been assets. There might have been a claim possibly for some share of profit out of the transaction, but the trustee in such a bankruptcy would not get the general property in the goods, which is the only thing seizable in prize: see *The Odessa*. (1)

If on October 15 the Germans had seized these goods and claimed to have them condemned as prize as being the property of persons liable to be treated as Japanese enemies they would seem to have had a stronger case than the British captors have. The fact that the goods were on a German ship undoubtedly raises a presumption against the claimants, but the claimants have clearly shown that the real and true ownership of these goods was neutral. In their Lordships' opinion the dealings with the goods seized on the *Lützow* by the appellants and their branches were bona fide from the beginning to the end, and the only British complaint against them is want of promptness in closing their trade in Germany. The rule as to concerns of a foreign trade is somewhat vague, but a careful examination of the dealings with these particular goods does not seem to bring them within the fair meaning of the expressions used or to make the ownership of them liable to be treated as German by reason of the appellants continuing some trade in Germany after the war had begun. If any nationality other than its own were to be attributed to the appellant company as owner of these goods it would be a Japanese nationality rather than a German. They were more the concerns of the Japanese than of the German branch, and the transaction had really originated in Japan, although the title to the goods had originated in Germany. On the view their Lordships take of the facts it is unnecessary on this appeal to express any opinion on any other question. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed with costs of the appeal. It is not a case for damages or costs in the Court below.

Solicitor for appellants: *G. L. Lepper.*

Solicitor for respondent: *The Treasury Solicitor.*

(1) [1916] 1 A. C. 145.

[PRIVY COUNCIL.]

J. C.*
1918
Jan. 22.

THE ALWINA.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Neutral Vessel—Contraband Cargo—Coal for Enemy Cruisers—False Papers—Abandoned Voyage—Capture on Return Voyage—Declaration of London, arts. 38, 46—*Orders in Council, August* 20 *and October* 29, 1914.

A Dutch vessel left a British port on October 26, 1914, with a cargo of coal ostensibly consigned under a charterparty to a neutral firm at Buenos Aires, but in fact intended to be supplied to enemy cruisers at sea. On arrival of the vessel at Teneriffe the voyage was abandoned, the coal being discharged and sold. In the course of her return voyage to Rotterdam she put into Falmouth and on January 23, 1915, was there seized as prize :—

Held, that the case was one of carrying contraband, not of the performance of an unneutral service, and that the vessel when captured was not liable to condemnation since she had neither "succeeded in carrying contraband to the enemy" nor "proceeded to an enemy port" so as to fall within the Orders in Council of August 20 and October 29, 1914, respectively.

Judgment for restitution subject to the payment of costs and expenses affirmed.

APPEAL and CROSS-APPEAL from a decree of the President of the Probate, Divorce, and Admiralty Division (in Prize). (1)

The Crown appealed from the decree so far as it ordered restitution of the Dutch steamship *Alwina* to her owners, and the owners appealed therefrom so far as it was ordered that they should pay the costs and expenses of and incidental to the capture and detention, together with the costs of the prize proceedings. The latter appeal was abandoned at the hearing.

The facts appear from the judgment of their Lordships.

1917. Dec. 10, 11. *Sir Frederick Smith, A.-G., Bateson, K.C.*, and *H. H. Joy* (for *H. L. Murphy*, serving with His Majesty's Forces), for the Crown. The *Alwina* was guilty not merely of carrying

* *Present :* LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) [1916] P. 131.

contraband but of the performance of unneutral services. There is an important distinction between those classes of acts : *Andersen* v. *Marten* (1) ; Hall's International Law, 6th ed., pp. 674, 685 ; Dana's Wheaton, pp. 637, 643. It was proved, or is to be inferred from the evidence, that the vessel had acted as a collier for enemy cruisers, being directly or indirectly in the employment or under the control of the German Government. Further, the supply of coal to enemy warships by a neutral is in itself an unneutral service. There is no direct authority for that proposition, but it is supported by *Burton* v. *Pinkerton* (2) (see also Holland's Letters on War and Neutrality, Div. 2, p. 161). The facts bring the vessel within art. 46 of the Declaration of London ; the Declaration was adopted by the Orders in Council of August 20 and October 29, 1914, subject to modifications which do not affect that article. (3) The vessel could therefore be treated as a German merchant vessel. That article, however, is not exhaustive as to what constitutes unneutral services. The vessel was liable to condemnation upon capture during the continuance of the war. At any rate, she was so liable at the date of capture, because it was not proved that the charterparty was terminated. If, however, the matter is to be treated merely as one of carrying contraband, the vessel, having carried false papers, was liable to capture upon her return voyage : *The Nancy* (4) ; *The Imina* (5) ; *The Baltic* (6) ; *The Margaret* (7) ; *Carrington* v. *Merchants Insurance Co.* (8) The principle of those decisions, namely, that the belligerent is defrauded, applies although the contraband is not delivered —certainly where the intention is frustrated, as here. *The Lisette* (9)

(1) [1908] A. C. 334, 338.

(2) (1867) L. R. 2 Ex. 340.

(3) Declaration of London, art. 46 ; "A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel : (i.) if she takes a direct part in the hostilities, (ii.) if she is under the orders or control of an agent placed on board by the enemy Government, (iii.) if she is in the exclusive employment of the enemy Government . . . ." The Order in Council of October 29, 1914 (1914, No. 1614), was amended and explained by an Order of March 30, 1916 (1916, No. 197), and was withdrawn by an Order of July 7, 1916 (1916, No. 1260).

(4) (1800) 3 C. Rob. 122.

(5) (1800) 3 C. Rob. 167.

(6) (1809) 1 Acton, 25.

(7) (1810) 1 Acton, 333.

(8) (1834) 8 Peters, 495, 518.

(9) (1807) 6 C. Rob. 387.

J. C. 1918 — THE ALWINA.

and *The Trende Sostre* (1) are not authorities that in the circumstances of this case the liability to capture was at an end. Art. 38 of the Declaration of London (2) does not apply, since the *Alwina* was not to be regarded as a neutral vessel. Further, she proceeded to an enemy port within the meaning of the Order in Council of October 29, 1914, cl. 1 (i.). (3)

Sir Erle Richards, K.C., R. A. Wright, K.C., and *Bisschop*, for the shipowners. It is not disputed that the original intention was to supply coal to enemy cruisers, but it was not established that the vessel was in the employment, or under the control of the German Government. The venture was merely one of carrying contraband. It has never been held that the delivery of munitions of war to a belligerent is more than engaging in contraband trade. The venture was abandoned and the coal sold at Teneriffe. Under those circumstances the *Alwina* was not liable to condemnation either according to general international law, nor under the Order in Council of August 20, 1914, cl. 3 (ii.) (4), or that of October 29, 1914, cl. 1 (i.). (3) The latter Order repealed and superseded the former.

[LORD PARKER OF WADDINGTON. As the facts do not come within the Orders in Council, it is not necessary to consider the law as to contraband further.]

Even if the facts came within art. 46 of the Declaration of London, or constituted an unneutral service, the liability to capture was ended, since the service was terminated. The vessel when captured was engaged under a new and independent charterparty. In the French (which is the authoritative version) of art. 46 the word (translated " if ") as to the circumstances under which the ship may be condemned is " lorsque." There is a consensus of opinion among writers on international law that the liability of a ship to condemnation for the performance of unneutral services terminates if she is not captured while still performing the service : Calvo, 4th ed., vol. 5, par. 2797, and works referred to in note there ; Bluntschli, par. 818 ; Perels (French ed., 1884), s. 47, p. 291 ;

(1) (1807) 6 C. Rob. 391, n.

(2) The material part of art. 38 is set out in the judgment at p. 450.

(3) Manual of Emergency Legislation, 2nd Suppt., p. 78.

(4) Manual of Emergency Legislation, p. 143.

Oppenheim, 2nd ed., vol. 2, p. 526; Holland, Manual of Naval Prize Law, 1888, c. 7, arts. 93, 103.

Bateson, K.C., in reply. The freight under the original charterparty had been paid until January 17, 1915. It should be inferred that the new charterparty was for the benefit of the original charterers and that the vessel was still under the control of the German Government.

1918. Jan. 22. The judgment of their Lordships was delivered by

LORD SUMNER. This is the Crown's appeal for the condemnation of the steamship *Alwina* on the ground that she was when seized or had been engaged in unneutral service. She was owned by the N.V. Holland Gulf Stoomvaart Maatschappij which is managed by Mr. Jos. de Poorter, a subject of the Queen of the Netherlands. On October 26, 1914, she cleared from Newport (Mon.) for Buenos Aires via Teneriffe with a cargo of coals, and put into Teneriffe on November 6, ostensibly to bunker. There seems to have been something suspicious about her from the first, and, in fact, bunker coals were refused her. Somehow the notion got about that her cargo was being exported for the supply of the German squadron in the South Atlantic. Eventually the captain himself came to the conclusion that this was probably true. There was on board a man called Van Dongen, of whom Mr. Jos. de Poorter says: "The nationality of the said Van Dongen is supposed to be Dutch, but I cannot say anything as to that with any degree of certainty." In the ship's papers he figured sometimes as steward, sometimes as a passenger, though the ship had no quarters for passengers, and sometimes not at all. Mr. Jos. de Poorter knew nothing about him, and thinks he must have arranged his passage with the captain. As to that the captain maintains an impenetrable reserve. When the *Alwina* arrived at Teneriffe Van Dongen at once went on board the steamship *Cap Ortegal*, and subsequently took up his quarters on shore. Now the steamship *Cap Ortegal* was a German armed cruiser, which, as it happened, was at Teneriffe when the *Alwina* arrived. In the long run Captain Glashouwer, of the *Alwina*, came to the conclusion that Van Dongen must be a supercargo, and a supercargo let him be.

J. C. 1918 THE ALWINA.

According to the ship's papers the time charterers of the ship and consignees named in the bill of lading were Messrs. A. M. Delfino y Hermanos of Buenos Aires. The hire of the ship was paid in advance up to January 17, 1915. The price of the cargo was paid to Mr. Jos. de Poorter by Messrs. Delfino y Hermanos before the ship left Newport. Such was Mr. Jos. de Poorter's case. When, however, no bunker coals could be got at Teneriffe Captain Glashouwer and Mr. Jos. de Poorter seem to have come to the conclusion that they must bring the adventure to an end then and there. Though Messrs. Delfino y Hermanos had paid in advance for the ship's hire, and, as owners of her cargo, might have ordered part of it to be burnt in her furnaces in prosecuting the voyage to Buenos Aires, no letter or telegram was sent to them in South America. Captain Glashouwer and Mr. Jos. de Poorter set about finding buyers who would take delivery at Teneriffe, the one in Holland, the other on the spot. On a letter from Van Dongen the captain opened negotiations with a Spanish buyer, but, as this buyer resold to the *Cap Ortegal*, the bargain was cancelled by the Spanish authorities. Then Mr. Jos. de Poorter wrote that he had sold the coals to the owners of a German ship, the *Krefeld*, but she was unable to take delivery until the end of the war. He also telegraphed to Captain Glashouwer that he was to sell the coals as the hire had not been paid and the charter was therefore cancelled. This was untrue. The hire had been paid. The charter was cancelled at Mr. Jos. de Poorter's verbal request. His manager happened to meet Messrs. Delfino y Hermanos, of South America, somewhere in Europe and arranged with them, also verbally, to have the coal sold at Teneriffe. Eventually sold it was and discharged, the captain assuring the buyer that it was the entire property of his owners, the firm of Jos. de Poorter, and the *Alwina*, thus relieved of an embarrassing burden, made for home in ballast via Madeira on December 30. The German cruiser squadron had been destroyed off the Falkland Islands on December 8.

Off Madeira the *Alwina* was visited by British officers and ordered to proceed to Gibraltar. Some time afterwards it was found that several pages from her harbour log, covering part of her stay at Teneriffe, were missing. Of this Captain Glashouwer says: "I made the discovery of the said removal on January 15, 1915, after

the said ship had left Huelva, and I have never been able to solve the mystery of their disappearance"; and he entered in his log that this was "probably at Gibraltar," but this hardy suggestion is contradicted by all the officials concerned. The Chief Examining Officer of Shipping at Gibraltar allowed her to proceed to Huelva, and there she loaded a cargo of washed sulphur ore smalls in bulk for Rotterdam. A voyage charter and bill of lading for this are produced. On her way to Rotterdam she put into Falmouth owing to engine trouble, and there was detained and ultimately seized on January 23, 1915.

The opinion of the learned President about the whole matter is expressed as follows (1): "The correct finding, in my view, is that the vessel, being a neutral vessel, was carrying contraband, namely, coal, intended to be delivered to enemy agents, or enemy vessels of war encountered on the voyage; and that she was so carrying the contraband with false papers, with a suspicious supercargo, with a false destination, and in circumstances amounting to fraud in regard to belligerents. . . . . What is clear is that de Poorter, the shipowner himself, was an active party in the attempt to convey the contraband to the enemy by the false and fraudulent tricks and devices which were adopted."

On the grounds of law he released the ship, but he ordered that the owner by reason of his conduct do bear and pay the costs and expenses of and incident to the capture and detention, and also of and incident to these prize proceedings.

From this decision there are two appeals, which have been consolidated, the Crown claiming condemnation, Mr. Jos. de Poorter, or the Holland Gulf Stoomvaart Maatschappij, claiming that the costs and expenses ought to be borne by the Crown. This cross-appeal, however, the shipowners have withdrawn without attempting to argue it, and no doubt in this were well advised. Their Lordships think that a conclusion on the facts adverse to Mr. Jos. de Poorter was inevitable, but, after carefully reconsidering the evidence, they are not minded to carry their view beyond the point reached by the President. The case is one of contraband.

Mr. Jos. de Poorter claims the benefit of the Declaration of London as modified when it was adopted by the Orders in Council

(1) [1916] P. 140.

J. C. 1918 THE ALWINA.

dated August 20 and October 29, 1914. By art. 38, "a vessel may not be captured on the ground that she has carried contraband on a previous occasion, if such carriage is in point of fact at an end," and this, as modified, becomes, under the first Order, "a neutral vessel which succeeded in carrying contraband to the enemy with false papers may be detained for having carried such contraband, if she is encountered before she has completed her return voyage," and, under the second, "a neutral vessel, with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage."

In *The Zamora* (1) their Lordships had occasion to observe: "It does not follow that, because Orders in Council cannot prescribe or alter the law to be administered by the Prize Court, such Court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be."

There can be no doubt, from the recitals contained in these instruments and otherwise, that the provisions above quoted were meant to operate in favour of neutrals, and to be a restrictive definition of the rights which His Majesty would exercise as a belligerent Sovereign in the present war so long as they remained unrescinded. Whether the difference between these provisions and the general rules of international law as laid down before the outbreak of this war be great or small, or takes one form or another, it is not necessary to inquire. Unless this neutral vessel falls within the cases specified, it is enough for present purposes to say that "she may not be captured"—that is, in the course of her voyage from Huelva to Rotterdam—"on the ground that she has carried contraband on a previous occasion"—to wit, coal on an outward voyage from Newport (Mon.) as far as Teneriffe—"if such carriage is at an end," as it was as soon as the coal was safely landed there. Now she never succeeded in carrying contraband to the enemy, and she never proceeded to an enemy port, and so she has the good fortune to fall outside the cases specified and to escape condemnation. Such was the President's decision, and their Lordships think it was

(1) [1916] 2 A. C. 77, 97.

right. They will humbly advise His Majesty that both these appeals should be dismissed with costs. J. C. 1918 THE ALWINA.

Solicitors for the Crown : *The Treasury Solicitor.*
Solicitors for the owners of the *Alwina : Tarry, Sherlock & King.*

[PRIVY COUNCIL.]

CANADA NATIONAL FIRE INSURANCE COMPANY . . . . . } APPELLANTS ;

AND

HUTCHINGS AND OTHERS . . . . . RESPONDENTS.

J. C.* 1918 *Jan.* 31.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Canadian Company—Transfer of Shares—Paid-up Shares—Refusal of Directors to register—By-law of Company—Ultra Vires—Construction of By-law—Companies Act (R. S. Can., 1906, c. 79), ss. 132, 138, 143, 145.

The power given by s. 132 of the Companies Act (R. S. Can., 1906, c. 79) to the directors of a company to which Part II. of that Act applies to make by-laws regulating the transfer of stock does not warrant the making of a by-law giving the directors an unrestricted power to disapprove transfers.

A by-law made by the directors, and confirmed by the shareholders under s. 133, purporting to give the directors an unrestricted power in the matter, should be construed as merely authorizing them to disapprove in the case of shares which are partly paid or upon which calls are due (as provided by ss. 143 and 145), and upon those grounds of title and conveyance which it is their duty to attend to.

CONSOLIDATED APPEALS from judgments of the Court of Appeal for Manitoba (April 3, 1917) affirming judgments of Galt J.

The two companies, appellants in the two consolidated appeals respectively, were each constituted by special Acts of the Dominion Legislature whereby Part II. of the Companies Act (R. S. Can., 1906, c. 79) was incorporated, save certain sections not material to the appeals. The respondents in each appeal were the transferors

* *Present :* LORD PARKER OF WADDINGTON, LORD SUMNER, and SIR WALTER PHILLIMORE, BART.

J. C.
1918
CANADA NATIONAL FIRE INSURANCE COMPANY v. HUTCHINGS.

and transferee of fully-paid shares in the respective companies by transfers which were regular in form.

The directors having in each case declined to approve and register the transfers, the respondents sued the companies in the Supreme Court of Manitoba to compel them to do so.

The facts, together with the material statutory provisions and by-laws of the companies, appear from the judgment of their Lordships.

Galt J. gave judgment for the respondents, and his decision was affirmed by the Court of Appeal (Howell C.J.A. and Perdue and Cameron JJ.A.). The judgments are reported at 27 Manitoba Rep. 496.

1917. Dec. 19, 20. *W. A. T. Sweatman*, for the appellants. The by-law confirmed by the shareholders was intra vires and entitled the directors to disapprove the transfers. Under s. 138 of the Companies Act the stock was only transferable subject to conditions imposed by the by-laws. The " by-laws " intended were such by-laws as a common law company could make. That view is supported by the use of that expression in the Mining Companies Charters Act (Can., 27 & 28 Vict. c. 23), s. 5, sub-s. 7, and in the Companies Act, 1844 (7 & 8 Vict. c. 110, Imp.), s. 25, and from the fact that the Canadian Companies Act, by s. 45, enacts provisions similar to s. 138 as applicable to letters patent companies, which are in the position of corporations at common law: *Bonanza Creek Gold Mining Co.* v. *Rex.* (1) The majority of the shareholders, who confirmed the by-law, had a common law power to say who should be shareholders and under what conditions: *Childs* v. *Hudson's Bay Co.* (2); Interpretation Act (R. S. Can., 1906, c. 1), s. 30 (*b*). The English Companies Acts have always contained a section, now s. 22 of the Companies (Consolidation) Act, 1908, in practically the same terms as s. 138. Nevertheless a provision like that now in question has always been held valid, whether included in a deed of settlement or in articles of association: *Borland's Trustee* v. *Steel Brothers & Co.* (3); *Harrold* v. *Plenty* (4); *In re Gresham Life Assurance Society.* (5) There

(1) [1916] 1 A. C. 566.
(2) (1723) 2 P. Wms. 207.
(3) [1901] 1 Ch. 279.
(4) [1901] 2 Ch. 314.
(5) (1872) L. R. 8 Ch. 446.

is nothing in the special Acts nor in the general Act which limits the inherent power to make by-laws. Even if the word "regulating" in s. 132 governs "transfers of stock," which grammatically it cannot, the section does not exclude the by-law in question.

[LORD SUMNER referred to *Attorney-General for Ontario* v. *Attorney-General for the Dominion*. (1)]

There are Canadian decisions adverse to the appellants, but they are erroneous; the view of Meredith J.A. in his dissenting judgment in *In re Good and Jacob Y. Shantz, Son & Co.* (2) is correct. [Reference was also made to *In re Panton and Cramp Steel Co.* (3), *In re Imperial Starch Co.* (4), *Montgomery* v. *Mitchell* (5), *In re Belleville Driving and Athletic Association* (6), and *Société Canadienne-Francaise* v. *Daveluy*. (7)] It is often desirable that there should be a power to exclude certain shareholders, but if the by-law is ultra vires there is no available method.

Upjohn, K.C., and *Manning*, for the respondents. The companies are purely statutory corporations created by special Acts, incorporating parts of the general Act. They have only those powers which are expressly given by the statutes, and not, as in the case of a chartered corporation, all powers which are not taken away. The Companies Act by s. 132 gives express but limited power to make by-laws; that excludes any inherent power. The present question is, therefore, purely one of the construction of the statutory powers. The necessary construction of the by-law in order to give it validity is that the directors are to have power to disapprove in those cases in which their approval is requisite under the special or general Acts, or by-laws properly made thereunder.

[They were stopped.]

Sweatman replied.

1918. Jan. 31. The judgment of their Lordships was delivered by

SIR WALTER PHILLIMORE. The first-mentioned action is brought by the transferor and transferee of a parcel of fully paid-up shares in

(1) [1896] A. C. 348, 362.
(2) (1911) 23 Ont. L. R. 544, 554.
(3) (1904) 9 Ont. L. R. 3.
(4) (1905) 10 Ont. L. R. 22.
(5) (1907) 18 Manitoba Rep. 37.
(6) (1914) 31 Ont. L. R. 79.
(7) (1892) 20 Can. S. C. R. 449, 456.

J. C.
1918
CANADA NATIONAL FIRE INSURANCE COMPANY v. HUTCHINGS.

the Canada National Fire Insurance Company against that company; the second action is also a joint action by two transferors and the transferee of two parcels of fully paid-up shares in the Great West Permanent Loan Company against that company. It is the same transferee in both cases, and the same point, that is, whether the directors of either company have an absolute power of refusing to approve and register transfers of fully paid-up shares regular in form and regularly presented to them.

It appears that in the first instance application was made upon motion for prerogative writs of mandamus; but that upon some question arising as to the propriety of this form of remedy the applications for these writs were by consent converted into actions, statements of claim being delivered setting forth the facts, and claiming as relief a mandamus or an order in the nature of a mandamus commanding either defendant company to register the transferee as the owner of the shares in question.

Some formal evidence was given; but, again by consent, the actions were heard upon motion for judgment without further pleadings, it being agreed that the matter was one entirely of law.

Both companies were constituted by special Acts incorporating Part II. of the Companies Act (R. S. Can., 1906, c. 79). Except as incorporating the general Act, the special Acts are of no importance in this case.

The material sections of the general Act are as follows: [Their Lordships' judgment set out the sections appearing in the footnote at p. 459.]

At the time of the presentation of the transfers for registration the by-law of the insurance company relating to the transfer of shares was in the following terms:—

"Article VII. (*a*) Shares in the capital stock of the company shall be transferable only on the books of the company by the owner in person, or by attorney, on surrender of the certificates of stock properly endorsed. (*b*) Transfers and allotments of shares shall not be valid unless approved by the board of directors."

And the by-law of the loan company was in the following terms:—

"Article III.—This stock shall be issued subject to the following conditions:—(*a*) That the holder of this stock will be paid the

semi-annual dividends that may be declared from time to time by the board of directors. (*b*) Said dividends shall be payable on the 1st day of January and July of each year. (*c*) That said stock shall be non-withdrawable, but may be sold, and such transfers must be recorded in the books of the company.

"Assignment of stock shall not be valid unless approved and endorsed by the board of directors and accompanied by a transfer fee of one dollar. The assignment shall be accompanied by the stock certificate."

These by-laws had been confirmed by the shareholders in their respective companies, and were in force when the transfers were presented for registration.

After the receipt of the transfers a meeting of the directors of each of the companies was held, and the by-laws were then amended by the addition in each case of the following words:—"For greater certainty, but not so as to restrict anything herein contained, or/and in addition thereto, the directors may refuse to register any transfer of stock heretofore or hereafter made upon which the company has a lien; and the directors, without assigning any reason, may refuse to register any transfer of stock heretofore or hereafter made, whether fully paid-up stock or not, to a person of whom they do not approve."

These amendments, however, were never brought before or confirmed by the shareholders of either of the companies; and counsel for the appellants admitted that he could not place reliance upon them.

Upon the actions coming on for hearing the judge of first instance (Galt J.) decided in favour of the plaintiffs, and ordered the defendant companies to register the transfers, make the necessary entries, and issue the proper certificates. Upon appeal the Court of Appeal (Howell C.J.A. and Perdue and Cameron JJ.A.) confirmed those decisions.

The question now raised upon appeal from the Court of Appeal is one of some importance, in the solution of which their Lordships have been greatly assisted by counsel. There are two branches of it: (1.) Did the by-law in the case of either company warrant the directors in their refusal? (2.) If so, was the by-law valid?

At the time that the cases were before the Courts in Manitoba the

J. C. 1918 CANADA NATIONAL FIRE INSURANCE COMPANY v. HUTCHINGS.

amendments to the by-laws had not come up before the shareholders for confirmation, and the Courts below appear to have proceeded upon the footing that they were provisionally in force. If this were so still, there would only be one matter for inquiry: Were the by-laws valid? But now that the amendments have not been confirmed, and after the admission of counsel for the appellants, both matters have to be considered.

Upon the whole it will be best to give first consideration to the point upon which the Courts below decided, the validity of a by-law supposing it to warrant the directors in absolutely refusing to register a transfer of fully paid-up shares, regular in form and regularly presented.

In the argument for the appellants stress was laid upon the line of English decisions upon cases of this nature arising under the Joint-Stock Companies Acts. There is, however, for the present purpose no analogy between companies in the United Kingdom which are formed by contract, whether it be under deed of settlement or under memorandum and articles of association to which the Registrar of Joint-Stock Cmopanies necessarily assents if the documents are regular in form, and Canadian companies which are formed under the Canadian Companies Act, either by letters patent or by special Act.

A nearer resemblance would be found in the Companies Clauses Act, 1845. But it is wiser to look at the Canadian legislation as complete in itself and unaffected by British jurisprudence.

The Canadian Companies, at any rate those created under Part II. of the general Act by special Act, are pure creatures of statute, and their powers and duties are to be found in the two Acts. There being nothing material in the special Act, their Lordships look to the general Act, and especially to ss. 132 and 138. The latter section provides that stock shall be personal estate and transferable. No doubt the stock is transferable "in such manner only, and subject to such restrictions and conditions as are prescribed by this part" (of the Act) "or by the special Act or the by-laws of the company" (s. 138). This provision, however, is not to be construed as empowering the company to make restrictive by-laws. The power to make by-laws is in s. 132, and it is confined in this matter to by-laws regulating ". . . . the transfer of stock." Regulation

does not mean restriction, still less subjection, to an arbitrary veto.

The words in s. 138 should be construed reddendo singula singulis, and so construed mean subject to such restrictions as are imposed by the general or the special Act and in such manner as prescribed by the by-laws. The word "condition" is perhaps ambiguous. If the condition is to effect substantive limitation, it would go with "restriction"; if formal, with "manner."

That a power of regulation does not extend to restriction was well stated by MacMahon J. in *In re Imperial Starch Co.* (1) in language which was adopted in a later case, and which their Lordships would repeat: "The statute gives the company power to pass by-laws 'regulating the transfer' of stock; that is: How and in what manner and with what formalities it is to be transferred. But the Imperial Starch Company has passed a by-law virtually empowering the directors to prohibit the transfer of stock; that is, unless the directors approve of the transfer it cannot be made in the books of the company. This, in effect, would prevent a holder of fully paid-up shares in the company from selling and realising on his stock, because no purchaser could be found, if registration as owner could be prevented at the caprice of the directorate."

And their Lordships are of opinion that the Court of Appeal for Ontario came to the right conclusion in *In re Good and Jacob Y. Shantz, Son & Co.* (2) The reasoning of the judges who were in the majority in that case is substantially the same as that of MacMahon J. in *In re Imperial Starch Co.* (1); and it is in that case that his words are adopted by Garrow J.A.

It is to be observed that Jacob Y. Shantz, Son & Co. was a limited company formed under letters patent by virtue of Part I. of the Companies Act, and not by special Act in accordance with Part II. But, so far as there is any difference, the argument against assuming that a company formed under the Companies Act has any other powers than those expressly given to it is stronger in the case of a company incorporated by special Act than in the case of a company incorporated by letters patent.

The conclusion is that a by-law purporting to impose such a restriction upon transfer as would be imposed if the directors had a power

(1) 10 Ont. L. R. 22, 25. (2) 23 Ont. L. R. 544.

J. C.
1918
CANADA NATIONAL FIRE INSURANCE COMPANY v. HUTCHINGS.

of veto would be ultra vires; and further that it would interfere with that transferability of stock which is an ordinary incident to personal property, and which is provided for in the general Act. This is the conclusion at which correctly, in their Lordships' opinion, the Courts of Manitoba have arrived. If, therefore, the by-laws of these two companies purport to give such a power of veto they cannot stand. This is the matter of general interest, to which alone the Courts below addressed themselves, and which has accordingly been dealt with by their Lordships in the first instance.

But now that it is admitted that the amendments are not to be regarded, it may be that the by-laws upon a true construction do not purport to impose any such restriction.

There is a slight difference in the language as between the two companies, but it is not material. Both require transfers to be approved, and to be recorded in the books of the company. This leaves to the directors certain matters upon which they have to exercise a judgment. They are by s. 143 to refuse to register if a call is unpaid. They have under s. 145 a discretion in the case of stock not fully paid up. They are entitled to take precautions against forged transfers. If the shareholder on the books is dead or has become bankrupt, they have to see that the title has duly devolved upon the transferor before they register his transfer. The usual form of assignment in these companies is by transfer indorsed on the certificate. The directors may require a transfer in this form, or satisfactory explanation and indemnity in case of a departure from it. They could refuse to register a transfer to an alien enemy. They may, and in the case of one of the two companies they do, require a reasonable fee. On the whole, the directors have the powers and duties conferred by ss. 143 and 145, and they have to see to matters of title and conveyance.

A by-law requiring their approval is properly construed as meaning that they are to be satisfied in respect of matters which are within their province. So construed, as it should be, ut res magis valeat quam pereat, it is a valid by-law; but one which gives no warrant for the imposition of a veto.

On both grounds, therefore, because the action of the two companies in refusing to register these transfers was not supported by

their by-laws, and because if it were so supported the by-laws would be invalid, this appeal fails.

It was pressed upon their Lordships that there are classes of companies in which it is highly important that directors should have such a power of veto; and this consideration had weight with the two learned judges who formed the minority in *Good's Case*. (1) It may well be so. There are decided cases in the English Courts which show that such a power may be lawfully reserved on the occasion of the constitution of the company, and a sufficient number of such cases to show that the power has been found convenient in use. But if it is to be introduced under the Canadian Legislature, it must be in the letters patent or in the special Act.

Their Lordships will therefore humbly recommend to His Majesty that these consolidated appeals should be dismissed with costs.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Peter Thomas & Clark.*

NOTE.—The Companies Act (R. S. Can., 1906, c. 79):—

BY-LAWS.—Sect. 132: "The directors may from time to time make by-laws, not contrary to law or to the special Act or to this part, for—(*a*) the regulating of the allotment of stock, the making of calls thereon, the payment thereof, the issue and registration of certificates of stock, the forfeiture of stock for non-payment, the disposal of forfeited stock and of the proceeds thereof, and the transfer of stock; (*b*) the declaration and payment of dividends; (*c*) the number of the directors, their term of service, the amount of their stock qualification, and their remuneration, if any; (*d*) the appointment, functions, duties, and removal of all agents, officers, and servants of the company, the security to be given by them to the company, and their remuneration; (*e*) the time and place for the holding of the annual meeting of the company, the calling of meetings (regular and special) of the board of directors and of the company, the quorum at meetings of the directors and of the company, the requirements as to proxies, and the procedure in all things at such meetings; (*f*) the imposition and recovery of all penalties and forfeitures admitting of regulation by by-laws; and (*g*) the conduct in all other particulars of the affairs of the company."

Sect. 133: "The directors may from time to time repeal, amend, or re-enact any such by-law, provided that every such by-law, repeal, amendment, or re-enactment, unless in the meantime confirmed at a

(1) 23 Ont. L. R. 544.

J. C.
1918
CANADA NATIONAL FIRE INSURANCE COMPANY v. HUTCHINGS.

general meeting of the company duly called for that purpose, shall only have force until the next annual meeting of the company, and in default of confirmation thereat shall from the time of such default cease to have force or effect."

CAPITAL STOCK AND CALLS THEREON.—Sect. 138: "The stock of the company shall be personal estate, and shall be transferable in such manner only and subject to such conditions and restrictions as are prescribed by this part, or by the special Act, or the by-laws of the company."

Sect. 143: "No share shall be transferable until all previous calls thereof have been fully paid, or until it is declared forfeited for non-payment of a call or calls thereon."

BOOKS OF THE COMPANY.—Sect. 144: "The company shall cause a book or books to be kept by the secretary, or by some other office specially charged with that duty, wherein shall be kept recorded—(*e*) All transfers of stock in their order as presented to the company for entry, with the date and other particulars of each transfer, and the date of the entry thereof."

Sect. 145: "The directors may allow, or refuse to allow, the entry in any such book of any transfer of stock whereof the whole amount has not been paid."

Sect. 146: "No transfer of stock, unless made by sale under execution, or under the decree, order, or judgment of a Court of competent jurisdiction, shall be valid for any purpose whatsoever, until entry thereof has been duly made in such book or books, ..."

[PRIVY COUNCIL.]

THE LOUISIANA AND OTHER SHIPS.

J. C.*
1918
Feb. 1.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Cargo—Conditional Contraband—Bill of Lading—Named Consignee—Order in Council, October 29, 1914—Declaration of London, 1909, art. 35.

The Declaration of London, 1909, which was not ratified by Great Britain, by art. 35 purported to abrogate the doctrine of continuous voyage in the case of conditional contraband. An Order in Council of October 29, 1914 (1), by clause 1 provided that the Declaration of London should be adopted during the present hostilities subject to certain modifications. Modification (iii.) provided as follows: "Notwithstanding the provisions of art. 35 of the said Declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order,' or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee of the goods in territory belonging to, or in the occupation of, the enemy."

In March, 1915, the appellants, who were neutrals, shipped conditional contraband goods, namely fodder stuffs, from the United States in neutral ships under bills of lading which purported to make the goods deliverable to named neutral traders at Swedish ports. Their Lordships, affirming the decision of the Prize Court, found that the appellants had acted in the transactions by the directions of an agent of the German Government, and that the persons named as consignees in the bills of lading had no real interest in, or control over, the goods:—

Held, that the persons to whom the bills of lading made the goods deliverable were not "the consignees of the goods" within the meaning of the Order in Council, and that the goods had been properly condemned as being destined for the German Government.

In considering, upon the principle of continuous voyage, what is the ultimate destination of goods which are conditional contraband, it is the intention of the person who is in a position to control the destination which is material.

APPEALS from decrees of the President of the Probate, Divorce and Admiralty Division (in Prize). (2)

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) The Order in Council of October 29, 1914 (1914, No. 1614), was amended and explained by an Order of March 30, 1916 (1916, No. 197), and was withdrawn by an Order of July 7, 1916 (1916, No. 452).

(2) Unreported.

J. C. 1918 — THE LOUISIANA.

The appeals, which were heard together, were by two American companies and an American citizen against decrees condemning conditional contraband goods, namely fodder stuffs, shipped by them in the neutral steamships *Louisiana*, *Tomsk*, *Nordic*, and *Joseph W. Fordney*. The goods were shipped from the United States in March, 1915, under bills of lading which made them deliverable in each case at a Swedish port to, in the case of the *Nordic*, W. Fritsch, and in the other cases E. Klingener. Fritsch and Klingener were Swedish subjects and traders. In each case the bills of lading were forwarded by the appellant or appellants to the Danish firm of Christensen & Schrei, who carried on business at Copenhagen. The ships were diverted to a British port and the goods were there seized in April and May, 1915. The appellants claimed the goods alleging that they were their property respectively, and were not intended for disposal to any belligerent State. In the first three appeals the claimants alleged that Christensen & Schrei were their agents for sale; in the last appeal it was alleged that that firm had ordered the goods for Klingener.

The President (Sir Samuel Evans) on June 9, 1916, condemned the goods. He found in the case of each shipment that the goods were intended for, and had been acquired for, the German Government; and that Klingener, Fritsch, and Christensen & Schrei were merely intermediary tools.

1917. Dec. 11, 13, 14, 17. *A. Neilson*, for the appellants in the *Louisiana*, *Tomsk*, and *Nordic*; *Sir Erle Richards*, *K.C.*, and *Balloch*, for the appellants in the *Joseph W. Fordney*. It was not proved that the goods were destined for the enemy, much less that they were intended for warlike purposes. Further, the goods were consigned by the ships' papers to named persons in neutral ports; they were therefore not liable to capture under clause 1 (iii.) of the Order in Council of October 29, 1914. That Order was made in consequence of diplomatic complaints by a neutral Government as to the loss resulting from the taking of neutral ships into port for the examination of their cargoes (see American Journal of International Law, vol. 9, July, 1915, pp. 55, 65, 75, 78). If the Prize Court can inquire whether the named consignee has the right to

dispose of the goods the benefit intended to neutrals by the Order is taken away. " The consignee of the goods " is named wherever a real and responsible person is named, so that under the bill of lading he is liable for the freight and controls the delivery by indorsement. Where that is the case it is not material even if that person is an agent for an enemy Government. It must not be overlooked that under the Declaration of Paris goods of an enemy Government cannot be seized in a neutral ship. The Admiralty Manual, 1888, by pars. 72 and 73 treated the destination of a vessel as conclusive as to the destination of the cargo. The decisions of the President in *The Rijn* (1) and *The Sydland* (2) were as to named consignees who were merely blinds or conduit pipes; they do not apply where the named consignee is a responsible and bona fide trader. The Order in Council was amended and explained by an Order of March 30, 1916, and was withdrawn by the subsequent Order of July 7, 1916, the later Order providing that the " real consignee " must be shown. Those later Orders were made before the judgments in the present cases, but they cannot affect the rights of neutrals under the earlier Order.

Sir Gordon Hewart, S.-G., and *W. Stephens* (*Sir Frederick Smith, A.-G.*, with them), for the Crown. Upon the evidence it was rightly found that the real consignee of the goods was the German Government. The doctrine of continuous voyage applies to conditional contraband, not only to absolute contraband, though the destination to be proved is different: *The Peterhoff* (3); *The Kim.* (4) If the construction of the Order in Council contended for is right the application of the doctrine of continuous voyage to conditional contraband can always be evaded. The argument would eliminate the second stated ground for seizure. To satisfy the Order in Council the ship's papers must name the person who is in truth the consignee and the real destination of the goods. [Reference was also made to *The Rijn* (1), *The Sydland* (2) (followed in *The Posteiro* (5)), and *The Liv.* (6)]

Sir Erle Richards, K.C., replied.

(1) [1917] P. 145.
(2) [1917] P. 161, n.
(3) (1866) 5 Wall. 28, 58.
(4) [1915] P. 215, 272.
(5) Unreported, Aug. 28, 1917.
(6) Unreported, Nov. 22, 1917.

J. C. 1918 THE LOUISIANA.

1918. Feb. 1. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. These four appeals relate to certain fodder stuffs (being part of the cargoes of the steamships *Louisiana*, *Tomsk*, and *Nordic*, and the whole cargo of the steamship *Joseph W. Fordney*) which were seized on behalf of His Majesty in April and May, 1915, and have been condemned by the President as lawful prize. Each appeal is against the order of condemnation.

Fodder stuffs are not absolute contraband. They are conditional contraband only, that is to say, they cannot be condemned as lawful prize unless destined for the enemy Government or the enemy's naval or military forces. On the other hand, in determining this destination, the doctrine of continuous voyage is clearly applicable, and must be applied in every case in which the Crown has not waived its strict rights. The first question, therefore, in each appeal is whether the goods to which the appeal relates were destined for the enemy Government or the enemy's naval or military forces. The second question is whether, if so destined, the Crown has not, as contended by the appellants, waived its right to condemnation by the Order in Council of October 29, 1914, adopting during the present hostilities the provisions of the Declaration of London with certain additions and modifications, this Order, though since repealed, having been in force when the goods were seized.

In considering cases such as those with which their Lordships have now to deal, it is well to bear in mind that, according to international law, neutrals may during a war trade freely as well with the belligerents as with other neutrals. If, however, the goods in which they trade are in their nature contraband, the traffic involves certain risks. For a belligerent State is entitled to seize the goods in transit on reasonable suspicion that, being in their nature absolute contraband, they are destined for the enemy country, or, being in their nature conditional contraband, they are destined for the enemy Government or the enemy naval or military forces. The goods when seized must of course be brought into the Prize Court for adjudication, but in the Prize Court the neutral trader is not in the position of a person charged with a criminal offence and presumed to be innocent unless his guilt is established beyond reasonable doubt. He comes before the Prize Court to show that there was no reasonable suspicion justifying the seizure or to

displace such reasonable suspicion as in fact exists. The State of the captors is necessarily unable to investigate the relations between the neutral trader and his correspondents in enemy or neutral countries, but the neutral trader is or ought to be in a position to explain doubtful points. If his goods had no such destination as would subject them to condemnation by the Prize Court, it is his interest to make full disclosure of all the details of the transaction. Only if his goods had such destination can it be his interest to conceal anything or leave anything unexplained. If he does conceal matters which it is material for the Court to know, or if he neglect to explain matters which he is or ought to be in a position to explain, or if he puts forward unsatisfactory or contradictory evidence in matters the details of which must be within his knowledge, he cannot complain if the Court draws inferences adverse to his claim and condemns the goods in question.

In each of these appeals their Lordships find that the evidence discloses no such simple story supported by documents as one would expect in the case of straightforward transactions between neutrals in America and neutrals in Sweden or Denmark. The position of almost every person concerned is obscured in a cloud of mystery. The evidence is in some points insufficient and in others conflicting or misleading, and the several claimants have thought fit to leave entirely unexplained a number of circumstances which urgently call for explanation.

The cases of the part cargo ex steamship *Louisiana* and the part cargo ex steamship *Tomsk* may be taken together, and their Lordships note the following points :—

1. The position of Klingener in the case of the shipment per steamship *Louisiana* and of Fritsch in the case of the shipment per steamship *Tomsk*, is by no means clear. According to the appellants' manager, Mr. Harry B. Smith, these gentlemen were named as consignees in the bills of lading on the initiative of the appellants themselves, because it was thought that insurance companies required that there should be a named consignee resident in the country of the port of ultimate discharge. The appellants certainly gave Christensen & Schrei a guarantee that Klingener and Fritsch would indorse and deal with the bills as required by them. On the other hand, Klingener and Fritsch say that it was Christensen &

J. C. 1918 THE LOUISIANA.

Schrei who asked them to accept the respective consignments; but Christensen & Schrei do not confirm this story. There is no evidence that the appellants had any prior transactions with either Klingener or Fritsch, or how the appellants came to know of the existence of either of them. It is, however, quite certain that neither Klingener nor Fritsch had any real interest in the transaction nor any duty beyond indorsing and dealing with the bills as directed either by Christensen & Schrei or the appellants, or possibly some one behind the appellants.

2. It appears that Christensen & Schrei originally claimed to be owners of the goods. In the case of the shipment per steamship *Louisiana*, this claim was first put forward on their behalf by the Danish Minister on April 25, 1915, in a letter to Sir Edward Grey. In their declaration made on July 15, 1915, to the Danish Ministry of Commerce they refer to the goods as having been "purchased and consigned to" them. The meaning of this is obscure. It looks at first sight as if they meant to suggest, though without saying this in so many words, that they had purchased the goods; but this is inconsistent with the correspondence annexed to the declaration. To what purchase they refer remains a mystery. In their subsequent affidavit they in effect say there was no purchase, the goods having remained throughout the property of the appellants. Their own claim to ownership was thus abandoned.

3. The case ultimately put forward was that Christensen & Schrei were the appellants' agents for the sale of the goods in question on the Scandinavian markets, but there appears to have been no formal contract of agency, nor any arrangement as to how the agents were to be remunerated. Indeed, the transactions in question were the first transactions between the appellants and Christensen & Schrei, whose address had been obtained by the appellants from a firm in New York whose name is not disclosed. Assuming that Christensen & Schrei were agents for sale, their authority to sell would appear to be in the nature of a simple mandate revocable at will by the appellants, or possibly by some one behind the appellants. In case of such a revocation, Christensen & Schrei would be bound to deal with the bills of lading, or the goods represented by these bills, in manner directed by the person entitled to revoke the authority.

4. Though the appellants are claiming as owners, it is remarkable

that Mr. Harry B. Smith does not anywhere in his affidavit commit himself to the statement that his company ever at any material time owned the goods. The bills of lading, after indorsement by Klingener and Fritsch, appear to have been sent to him by Christensen & Schrei, and he says that his company is the holder or owner of the bills of lading and entitled to the immediate possession of the goods. But the "ownership" of a bill of lading, in the sense of holding it with a right to possession, which is what the affidavit seems to mean, does not always connote ownership of the goods comprised in the bill, and his affidavit is quite consistent with the ownership being in a third party on whose directions the appellants had acted throughout. It is also to be observed that Mr. Harry B. Smith does not state who forwarded the bills to Christensen & Schrei. He merely states that they were duly forwarded. It is left to Christensen & Schrei to depose to the appellants' ownership of the goods, as to which they would not necessarily know anything, and as to the appellants having forwarded the bills to them. In the case of the shipment per steamship *Louisiana* they produced a letter from the appellants enclosing the bills, but they produced no letter covering the bills in the case of the shipment per steamship *Tomsk*. In the latter case there is reason to suppose that the bills were so forwarded by the firm of K. & E. Neumond, of New York, who are admitted to have made some of the arrangements in connection with the shipment, though it does not appear in what capacity. This firm obtained the bills of lading per steamship *Tomsk*, from the agents for the ship, and, in consideration of the bills omitting reference to the fact that some of the bags had been torn and mended, gave the guarantee printed in the record. The connection of K. & E. Neumond with the transaction is wholly unexplained. Christensen & Schrei claim to have been their selling agents in Europe. This seems to suggest that K. & E. Neumond, and not the appellants, were in real control of the business in America. If, as originally declared by Christensen & Schrei, the goods had been purchased at all, that firm may well have been the purchasers, either on their own account or as agents for some one else.

5. That there was some one behind the appellants is rendered certain by the two wireless messages of April 1 and 9, 1915, from the Guaranty Trust Company, of New York, to the Disconto-Gesell-

J. C. 1918 THE LOUISIANA.

schaft, Berlin. In the first the Guaranty Trust Company tell their Berlin correspondent that the shipment per steamship *Louisiana* is being forwarded by them on account of "Albert." In the second the Guaranty Trust Company tell their Berlin correspondent that the shipment per *Tomsk* is being forwarded by them on account of "Albert" to Christensen & Schrei.

6. Mr. Greenwood, in his affidavit on behalf of the Crown, states certain facts which inevitably lead to the inference that the "Albert" mentioned in these messages was Heinrich Albert, a well-known agent of the German Government in the United States, who appears to have been acting through K. & E. Neumond, to whom he had been recommended by Christensen & Schrei, and to have been financed by the Disconto-Gesellschaft, of Berlin, through the Guaranty Trust Company, of New York. The appellants, who must be fully aware of the connection of Heinrich Albert, K. & E. Neumond, the Disconto-Gesellschaft, and the Guaranty Trust Company with the transaction in question, have chosen to leave this connection entirely unexplained and Mr. Greenwood's affidavit entirely unanswered.

Under the circumstances above mentioned, the only possible conclusion is that the shipments per *Louisiana* and *Tomsk* were made by or on behalf of the German Government through its agents in America, and that the details of the transactions were so arranged as to conceal the fact.

In considering, on the principle of continuous voyage, what is the ultimate destination of goods which are in their nature conditional contraband, it is the intention of the person who is in a position to control the destination which is really material. Had Klingener and Fritsch had any real interest, it might have been their intention which mattered. Had Christensen & Schrei purchased the goods, or even had they obtained possession of the bills of lading under circumstances which entitled them to dispose of the goods, notwithstanding orders to the contrary from the appellants, or some one for whom the appellants were acting, the intention of Christensen & Schrei would have been a material point. Had the appellants been dealing with their own goods on their own behalf, their intention might have been the determining factor. But if, as their Lordships find, the appellants were acting by the direction of an agent of the German Government, it is the intention of the German Government which

must be looked for. It would be ridiculous to suppose that the German Government were speculating in fodder stuffs for the Scandinavian markets. These stuffs were urgently needed in Germany for the purposes of the war, and the only possible inference is that the goods in question were intended to reach Germany and be utilized for war purposes. It is true, no doubt, that the municipal laws of both Denmark and Sweden prohibit the export of fodder stuffs, but it is not clear that this prohibition includes transhipment at Danish or Swedish ports, or that licences for export are not readily granted by the Danish or Swedish authorities, at any rate if the stuffs in question are not really needed for home consumption. The experience of the Prize Court during the war has made it clear that the laws referred to, however stringent, can be evaded.

Their Lordships come to the conclusion that the President was fully justified in finding that the shipments per steamships *Louisiana* and *Tomsk* were destined for the German Government.

[Their Lordships' judgment then dealt with the evidence as to the shipments in the *Nordic* and *Joseph W. Fordney*, as to which they also came to the conclusion that "the President was right in finding that the goods were destined for the enemy Government"; the judgment continued as follows:]

The remaining point to be considered is whether the Crown has or has not by the Order in Council of October 29, 1914, waived its right to the condemnation of the goods the subject of these appeals.

The Declaration of London was a provisional agreement embodying certain somewhat sweeping changes in international law. Its 35th article in effect entirely abrogates the doctrine of continuous voyage in the case of conditional contraband. Parliament refused to consent to its ratification, and it never became binding on this country. It was, however, by Order in Council dated August 20, 1914, adopted by His Majesty for the period of the present war with certain additions and modifications. By one of these modifications it was provided that, notwithstanding art. 35, conditional contraband, if shown to be destined for the armed forces or a Government department of the enemy State, should be liable to capture to whatever port the vessel was bound or at whatever port the cargo was

J. C. 1918 THE LOUISIANA.

to be discharged. This modification, in effect, neutralized art. 35, and the doctrine of continuous voyage remained as applicable to conditional contraband as it had been before the Order.

The application of the doctrine of continuous voyage to conditional contraband appears to have given rise during the earlier months of the war to certain diplomatic representations on the part of the United States. These representations are said to have led to the repeal of the Order of August 20, 1914, and to the substitution therefor of the Order in Council of October 29, 1914. By this last-mentioned Order the Declaration of London was again adopted by His Majesty for the period of the present war with certain additions and modifications. The material modification, however, now provided that notwithstanding art. 35 of the Declaration, conditional contraband should be liable to capture on board a vessel bound for a neutral port (1.) if the goods are consigned "to order," or (2.) if the ship's papers do not show who is "the consignee of the goods," or (3.) if they show "a consignee of the goods" in territory belonging to or occupied by the enemy. The effect of the Order is therefore to waive the doctrine of continuous voyage except in those cases expressly referred to in the modification. The appellants contend that none of the goods in question in these appeals can be brought within any of the cases referred to. None of the goods were consigned "to order." The bill of lading, which formed one of the ship's papers, showed in every instance who was the consignee of the goods, and neither the bill of lading nor any other of the ship's papers showed in any instance a consignee of the goods in territory belonging to or occupied by the enemy.

Their Lordships are of opinion that this contention cannot be sustained. It assumes that the words "if the ship's papers do not show the consignee of the goods" mean "if the ship's papers do not show a consignee of the goods." But on this interpretation there is no difference between the first case and the second, for a bill of lading which does not show a consignee is in effect for present purposes a bill to order. Further, the reason for not waiving the doctrine of continuous voyage in the case of consignments to order can only have been that in the case of such consignments the shipper retains the control of the goods, and can alter their destination as his interests may dictate or circumstances may admit. This

control may, however, be retained by the shipper, even if he consigns to a named person, provided that the consignee be bound to indorse or otherwise deal with the bill of lading as directed by the shipper. It would be useless to retain the doctrine of continuous voyage in the case of consignments to order, if the shipper could escape the doctrine by consigning to a clerk in his office and procuring the clerk to indorse the bill. He would in this manner retain as full control of the goods as if the consignment had been to order. It is impossible, in their Lordships' opinion, to construe the Order as an intimation to neutrals that, provided they make their consignment to named persons not residing in territory belonging to or occupied by the enemy, they may, in the case of conditional contraband, safely disregard the doctrine of continuous voyage. If the Order were so construed, the modification of art. 35 would be absolutely useless, and conditional contraband could be supplied to the enemy Government through neutral ports as freely as if art. 35 had been adopted without any modification at all. In their Lordships' opinion the words " the consignee of the goods " must mean some person other than the consignor to whom the consignor parts with the real control of the goods. It is said that such a construction would defeat the object in view, which must have been to make some concession for the benefit of neutral traders. But even if construed as in their Lordships' opinion it ought to be construed, the effect of the Order is to make a considerable concession. Under it merchants in one neutral country can, without risking the condemnation of their goods, consign them for discharge in the ports of another neutral country to the order of buyers or others to whom the principal in the ordinary course of business finally transfers the control of the goods. They are not concerned to inquire how such buyers or other persons intend to deal with the goods after delivery. No intention on the part of the latter to forward the goods to the enemy Government will render the goods liable to condemnation. This is no small concession.

In no one of the present appeals would the named consignee have had any real control over the goods consigned to him. In each case the named consignee was a mere agent for some one else and bound to act as that some one, whoever he might be, should direct. Under these circumstances their Lordships hold that the named consignee

J. C. 1918 THE LOUISIANA.

was not "the consignee of the goods" within the meaning of the Order in Council.

Each of these appeals must therefore, in their Lordships' opinion, be dismissed with costs, the costs of the petition to admit the supplemental record, in the case of the part cargo ex steamship *Louisiana* being made costs in that appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Botterell & Roche; Thomas Cooper & Co.*
Solicitor for respondent: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.* 1918 *Jan.* 31.

THE GERMANIA (No. 2).

ON APPEAL FROM THE PRIZE COURT, NEW SOUTH WALES.

Prize Court—Enemy Merchant Ship—British Port—Outbreak of War—Seizure—Provisional Requisition—Subsequent formal Requisition—Valuation—Date at which Value to be ascertained—Prize Court Rules, 1914, *Order* XXIX.*—Hague Convention No. VI., art.* 2.

A German merchant ship was seized in the port of Sydney upon the outbreak of war. On October 6, 1914, the Prize Court in New South Wales ordered that the ship be detained, and that she be temporarily delivered to the Lords of the Admiralty without appraisement upon an undertaking to comply with the provisions of Order XXIX. of the Prize Court Rules, 1914. On June 3, 1914, the Crown filed a notice under that order stating that it was desired to requisition the ship. On June 4, 1914, the Prize Court, in pursuance of the notice, made an order under Order XXIX., r. 3, that the ship be forthwith released and delivered to the Crown without appraisement and providing that the order should be a confirmation of the delivery already made; and it was thereby further ordered (under r. 4), that, unless the parties should within twenty-eight days agree the value, it be referred to the Registrar "to fix the amount to be paid by the Crown in respect of the value of the ship and her consumable stores and provisions," the order providing that the value was to be taken as at October 6, 1914:—

Held, without expressing an opinion whether the owners might ultimately establish a case for indemnity under the Sixth Hague

---

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR SAMUEL EVANS.

Convention, that the value of the ship was properly ordered to be fixed under Order XXIX., r. 4, as at October 6, 1914.

Held, further, that the Registrar rightly refused an application by the owners to adjourn the hearing of the reference until the end of the war so as to enable them to obtain evidence from Germany.

APPEAL from two orders of the Supreme Court of New South Wales, Admiralty Jurisdiction (in Prize), dated respectively June 4, 1915, and April 10, 1916.

The appeal was by the master and owners of the German merchant ship *Germania*. (1) The circumstances under which the order of June 4, 1915, were made and its effect appear from the head-note. That order was the first of the two orders appealed from.

The parties not agreeing the value, the Registrar in August, 1915, proceeded with the reference. The Crown called a certificated marine surveyor who valued the ship at 20,050*l.*, and the master was called upon the appellants' behalf, but gave no evidence of the value save as to the stores. The appellants asked for an adjournment to enable them to call evidence from Germany as to the cost of the insurance on, and profits derived from, the ship. This application was refused; the reference stood over till December, 1915, but no further evidence was called.

In February, 1916, the Registrar issued his report by which he fixed the value of the ship at 20,050*l.*; a further sum (which was agreed) being fixed for the stores and provisions. The appellants moved the Prize Court not to confirm the report on the ground that the evidence was insufficient, that it related to the value before the war, and that the adjournment for which they asked should have been granted. On April 10, 1916, Cullen C.J. made an order confirming the report. That order was the second order appealed from.

1918. Jan. 30, 31. *Bateson, K.C.*, and *A. Neilson*, for the appellants. Under art. 2 of the Sixth Hague Convention the

(1) Appeals by the masters and owners of five other German steamships—namely, the *Osnabrück*, the *Melbourne*, the *Tiberius*, the *Sumatra*, and the *Berlin*, with regard to which similar orders had been made under the like circumstances—were heard and disposed of together with the appeal in the *Germania*.

J. C. 1918 THE GERMANIA (No. 2).

appellants are entitled to an indemnity. The English version of that article says that a belligerent may requisition "on condition of paying compensation." The French, which is the authoritative version, says "moyennant indemnité." The amount to be fixed under Order XXIX., r. 4, is such an amount as will indemnify the owners. The order was therefore wrong in providing that the value should be fixed as at October 6, 1914. It should have been fixed as at the end of the war. If the date to be regarded is not the date when the owners would get repossession but for the requisition, the date should have been fixed at June 4, 1915, when the requisitioning order was made. Further the value to be ascertained was what the vessel was worth to her owners from a business point of view: *The Ironmaster* (1); *The Harmonides.* (2)

[SIR SAMUEL EVANS referred to *The Philadelphia.* (3)]

The appellants were, therefore, entitled to adduce evidence not only as to the cost of the ship, but as to the profits derived from her employment. They could only do so by calling evidence from Germany. That, no doubt, would have entailed an adjournment of the reference until the end of the war. If the appellants' contention is right that the value was to be fixed as at that date, such an adjournment was desirable in any event; if they are wrong, no inconvenience would arise from the adjournment.

Sir Gordon Hewart, S.-G., and *Raeburn*, for the Crown, were not called upon.

The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. Their Lordships express no opinion as to whether the appellants may ultimately be able to establish a case for indemnity under the Sixth Hague Convention. This will depend (1.) upon whether that Convention is binding in the events which have happened, and (2.) upon its true construction; but their Lordships do not propose to deal with either of these points on the present occasion.

With regard to the proceedings in the Court below, under Order XXIX. of the Prize Court Rules, they appear to have been perfectly regular. In particular, their Lordships consider that no mistake

(1) (1859) Swab. 441. (2) [1903] P. 1.
(3) [1917] P. 101.

J. C.
1918
THE GERMANIA (No. 2).

was made in not selecting the date for valuation contended for by the appellants. The only possible question is whether the appellants' application for an adjournment until the end of the war, on the ground that during the war they were not in a position to obtain evidence of value, ought to have been granted. Their Lordships cannot accept the suggestion that if the appellants' representatives in Australia had asked for a licence to communicate with the appellants in Germany as to the evidence to be adduced on their behalf such licence would have been refused; and no temporary adjournment for that purpose was ever even suggested to the Court, much less made the subject of a formal application. Under these circumstances their Lordships think that neither the Registrar nor the Chief Justice could have come to any other conclusion than the one arrived at.

Their Lordships will humbly advise His Majesty that these appeals should be dismissed with costs.

Solicitors for appellants: *Snow, Fox & Higginson.*
Solicitors for respondent: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

THE SÜDMARK (No. 2).

J. C.*
1918
March 1.

ON APPEAL FROM THE PRIZE COURT, EGYPT.

Prize Court—Cargo—Unloading before Prize Proceedings—Fire in Warehouse—Claim by Owners—Duty of Executive Officers—Convenient Port—Naval Prize Act, 1864 (27 & 28 *Vict. c.* 25), *s.* 16.

Seizures as prize are made by executive officers of the Crown; their duties towards the owners of the property seized fall to be determined by international law, not by the municipal law which governs their duties towards the Crown. There is no accepted rule of international law as to the officer in whose custody prizes should be placed when brought into a convenient port.

Sect. 16 of the Naval Prize Act, 1864, provides that "every ship taken as prize, and brought into port within the jurisdiction of a Prize Court, shall forthwith, and without bulk broken, be

---

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR SAMUEL EVANS.

J. C.
1918
THE SÜDMARK (No. 2).

delivered up to the marshal of the Court; if there is no such marshal, ... to the principal officer of customs at the port."

A German ship carrying copra, which belonged to British subjects and had been shipped before the war, was captured in the Red Sea, and on August 20, 1914, was taken into Alexandria. At that time Egypt was in British occupation, but no Prize Court had been there established; the nearest place at which a Prize Court was then sitting was Gibraltar. There being at Alexandria no marshal nor any British customs officer, the captor delivered the ship and cargo to a detaining officer who had been appointed by the British military authorities to take custody of prizes. That officer, in consequence of representations by the master of the ship that the copra was liable to deteriorate and other circumstances, without proceedings in prize having been instituted, caused the copra to be unloaded and placed in a warehouse, where it was partially destroyed by fire without negligence. The copra, so far as it was undestroyed, was released to the owners, and they subsequently claimed and were decreed damages against the captor and the detaining officer:—

Held, that neither the captor nor the detaining officer was liable, because (1.), as to the captor, Alexandria was a convenient port and the captor was justified in delivering the ship and cargo to the detaining officer, who did not receive it as the captor's agent; (2.) under the circumstances a Prize Court if applied to would have ordered the copra to be unloaded, and consequently the damage was not the result of not making an application; and, further, that the damages were too remote, there being no contract of bailment.

Lilley v. *Doubleday* (1881) 7 Q. B. D. 510 distinguished.

Observations as to the duties of captors and other executive officers, and as to what constitutes a convenient port.

APPEAL from a judgment and decree of His Majesty's Supreme Court for Egypt (in Prize).

The appellants, Captain Gilpin Brown, R.N., and Lieutenant Grogan, R.N., appealed against a decree whereby they had been held liable to pay damages to the respondents in respect of the destruction of and damage to the respondents' copra which had been partially destroyed by fire in a warehouse where it had been placed without any application to or proceedings in prize.

The facts appear from the judgment of their Lordships.

Judge Grain, the trial judge, held that the appellants were liable and ordered a reference as to damages. He found that Lieutenant Grogan was agent for Captain Gilpin Brown and held that the appellants were in the position of bailees and, having broken bulk contrary

to s. 16 of the Naval Prize Act, 1864, they were liable for the damage on the principle of *Lilley* v. *Doubleday* (1).

1918. Jan. 22, 23. *Sir Gordon Hewart, S.-G.*, and *James Wylie*, for the appellants. The appellant Grogan was not agent for the appellant Gilpin Brown; both were executive officers of, and agents for, the Crown. The latter was bound to deliver the ship and cargo to the former as detaining officer. Under the circumstances the detaining officer was justified under international law in unloading the cargo. Sect. 16 of the Naval Prize Act, 1864, is a rule of procedure to be observed by captors subject to the penalty imposed by s. 37, it gives no rights to the owners of goods seized. In any case, a breach of its provisions gives them no right to recover damages: *Gorris* v. *Scott* (2); *The Betsey* (*No.* 1). (3) The damages did not flow from the failure to apply to the Prize Court for an order; further, the damages were too remote to be recoverable. *Lilley* v. *Doubleday* (1) has no application, the Crown being under no contract of bailment.

Leslie Scott, K.C., and *C. R. Dunlop*, for the respondents other than Boustead & Co.; *Leck, K.C.*, and *A. M. Talbot*, for the respondents Boustead & Co. Under international law captors are bound to bring property seized into a convenient port for adjudication by a Prize Court, and, except under exceptional circumstances, may not break bulk: *The Washington* (4); Pratt's Story on Prize Courts, pp. 37, 38, 39, 86; Phillimore's International Law, vol. 3, ss. 359, 449; Holland's Manual of Naval Prize Law, s. 310. If before the res is brought in for adjudication the captors deviate from their duty in relation to it they are liable if upon the release of the res it is not forthcoming owing to a casualty occurring during the deviation: *Lilley* v. *Doubleday* (1); *Morrison & Co.* v. *Shaw, Savill & Albion Co.* (5) Captors are in the position of bailees: *The Maria* (*No.* 2) (6); Story on Bailment, s. 613. In the judgment in *The Maria* (6) stress is laid upon the fact that an order of the Court had been obtained. The appellant Grogan was agent for the appellant Gilpin Brown.

(1) 7 Q. B. D. 510.
(2) (1874) L. R. 9 Ex. 125.
(3) (1798) 1 C. Rob. 92, 98.
(4) (1806) 6 C. Rob. 275.
(5) [1916] 2 K. B. 783.
(6) (1803) 4 C. Rob. 348.

J. C. 1918 THE SÜDMARK (No. 2).

International law does not justify a captor in delivering to any officer other than the marshal or principal officer of Customs as provided by s. 16 of the Naval Prize Act, 1865. The res was within the jurisdiction of the Prize Court in England, and an order should have been applied for in that Court, or the ship should have been taken to Malta or Gibraltar. Further, if an order had been obtained the goods would have been covered by the insurance which the marshal in practice effects for the benefit of whoever is concerned: *Maisonnaire* v. *Keating* (1); *The Catherine and Anna.* (2)

Wylie, in reply, referred to the German Prize Regulations (July 15, 1915), art. 106; Calvo, vol. 5, p. 273; and to 45 Geo. 3, c. 72, ss. 30, 31, 32.

March 1. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. On August 15, 1914, the German steamship *Südmark* was captured in the Red Sea by His Majesty's ship *Black Prince*, under the command of the appellant Captain Gilpin Brown. She had on board a general cargo, including a large quantity of copra consigned to Hamburg and 2000 tons of barley consigned to Antwerp or Hamburg. Until the contrary was proved, the enemy character of the cargo would be presumed from the enemy character of the ship. After the capture Captain Gilpin Brown brought the ship with the cargo on board through the Suez Canal to the port of Alexandria, and there handed her over to the appellant Lieutenant Grogan, who had been appointed by His Majesty's military authorities in Egypt as detaining officer in respect of prizes brought to or captured in that port. Lieutenant Grogan caused the cargo to be unloaded and stored to his order in sheds belonging to the Egyptian Customs Administration. The unloading was completed early in October, 1914. On October 17 a fire occurred in the sheds where the cargo was stored, and a considerable part of the copra was burnt or damaged. What remained of the copra after the fire was in the course of the proceedings for condemnation of the ship and cargo released with the consent of the Procurator for Egypt to the respondents, who had entered a claim as owners, and the respondents thereafter brought an action in the Prize Court against Captain Gilpin Brown and Lieutenant Grogan to recover the

(1) (1815) 2 Gall. 324. (2) (1801) 4 C. Rob. 39.

loss occasioned by the fire. In this action Lieutenant Grogan has been held liable on the ground that he committed a breach of duty towards the respondents in causing the cargo to be unloaded and stored ashore. Captain Gilpin Brown has also been held liable on the ground that Lieutenant Grogan was his agent in causing the cargo to be landed, or alternatively that he was guilty of a breach of duty towards the respondents in handing over the ship and cargo to Lieutenant Grogan. Both Captain Gilpin Brown and Lieutenant Grogan are appealing from this decision. It will be convenient, in the first instance, to consider the duties of Captain Gilpin Brown as captor of the *Südmark*.

Seizures as prize are made by executive officers of the Crown in the exercise of the Crown's belligerent rights. The duties of these executive officers towards the owners of the property seized are the duties of the Sovereign and fall to be determined by international law. On the other hand, the duties of these executive officers towards the Crown must be determined by municipal law. As will presently appear, it is important to remember this distinction.

The title of the Crown to property seized as prize is not complete without adjudication in its favour by the Prize Court. The first duty of the Crown is therefore to preserve the property in order that it may be dealt with as the Prize Court may determine. If the property seized be a ship with cargo on board, the cargo should not (except under special circumstances) be disturbed until the ship be brought into a convenient port. The duty of the Crown to bring the ship into a convenient port without breaking bulk is generally discharged by the captors, and is sometimes referred to as the duty of the captors: Pratt's Story on Prize Courts, pp. 37—39. But it makes no difference to the owners of ship or cargo by whom the duty is discharged. For any loss occasioned by a breach of the duty the Crown may be made liable through the executive officer responsible for the breach or some other proper officer. As a matter of practice it is quite common for the captors, under the orders of their superior officer, to hand the prize to some other officer of the Crown to be taken into a convenient port, and it is impossible to hold that such practice is contrary to international law. On the prize being so handed over, the duties of the captors themselves with respect to it are at an end, though the duty of the Crown remains.

J. C. 1918 — THE SÜDMARK (No. 2).

The convenience of the port to which a prize is brought in for adjudication must be determined by all the circumstances of the case. Neutral ports are not convenient ports, for it is arguable that a neutral Power could not allow a prize to remain in its ports (except temporarily, and then only by reason of special circumstances such as stress of weather or want of provisions) without committing a breach of neutrality, and, further, it might be difficult to execute the order of the Prize Court of the captors over vessels in a neutral port. Other things being equal, the nearest available port should be preferred. A ship captured in the English Channel ought not as a rule to be taken to Gibraltar. It would be unreasonable to subject her to the risk of so long a voyage. But as between various home ports it would be quite proper to select the least congested port, or the port the voyage to which, though longer, would involve less danger from the risks incident to war. A convenient port must be such that the property can remain there in safety without being exposed to special risk from wind or tide. It should be capable of accommodating vessels of the draught of the captured ship. The real point to be considered is the safety of the prize, and the distance of the place where the Prize Court holds its sittings from the port selected is immaterial.

To the question whether Alexandria was a convenient port to which the *Südmark* might properly be brought after her capture their Lordships without hesitation return an affirmative answer It was not a neutral port, Egypt being in the military occupation of this country : see *The Gutenfels.* (1) For all material purposes it was a British port, and vessels detained there as prize would be subject to the orders of the appropriate British Prize Court. There was then no Court in Egypt exercising jurisdiction in matters of prize, but the Admiralty Division of the High Court in this country had jurisdiction over all such matters, and there would be no difficulty in executing its orders in the port of Alexandria. The suggestion that the *Südmark* ought to have been taken to Malta, at considerable risk, merely because there was a Court having jurisdiction in prize which sits at Malta, is, in their Lordships' opinion, untenable. It follows that Captain Gilpin Brown acted properly in bringing the *Südmark* into the port of Alexandria ; but

(1) [1916] 2 A. C. 112.

there is the further question whether he was justified in handing her over to the custody of Lieutenant Grogan.

So far as their Lordships can discover, there is no generally accepted rule of international law as to the officer in whose custody prizes should be placed when brought into a convenient port pending adjudication by the Prize Court. Inasmuch as the duty of the Crown to preserve the captured property subsists as well after as before the ship is brought into port, the matter is of little importance to the owners of the captured ship or cargo, and may be reasonably determined by the municipal law of the captors. In Germany prizes are handed over to the port authorities. In this country the persons to whom a prize should be handed over is in part regulated by statute. Sect. 16 of the Naval Prize Act, 1864, provides that every ship taken as prize and brought into port within the jurisdiction of a Prize Court shall forthwith and without bulk broken be delivered up to the marshal of the Court, but if there be no such marshal, then to the principal officer of Customs in the port. It should be noticed with regard to this section that it is one of a fasciculus of clauses dealing with procedure in Prize Courts, and procedure has always been recognized as a matter of municipal as opposed to international law. Further, the penalty for its breach is governed by s. 37 and involves only the loss of prize money—in other words, the loss of an advantage secured by municipal and not by international law. It should be noticed also that s. 16 has no application unless there be a marshal or a principal officer of Customs to whom the prize can be delivered. If there be no such marshal or principal officer, the section is inapplicable and the person to whom the prize is to be delivered would, according to our municipal law, fall to be determined by the Crown in the exercise of its prerogative.

There was no marshal or deputy-marshal and no principal officer of His Majesty's Customs in Alexandria to whom delivery could be made pursuant to s. 16, and it was no doubt for this reason that Lieutenant Grogan had been appointed on behalf of the Crown as detaining officer in respect of prizes brought to or captured in that port. Their Lordships cannot accept the suggestion that the principal officer of Egyptian Customs was the principal officer of Customs within the meaning of that section. Under these

J. C. 1918 THE SÜDMARK (No. 2).

circumstances Captain Gilpin Brown was, in their Lordships' opinion, fully justified in delivering the *Südmark* to Lieutenant Grogan. It is difficult to see how he could have acted otherwise. The suggestion that he constituted Lieutenant Grogan his agent for the future custody of the ship and cargo is, in their Lordships' opinion, based on a misconception of the true facts. It is supported only by the subsequent conduct of Lieutenant Grogan in handing the ship to Captain Borrett for delivery with other prizes to the Prize Court marshal appointed by His Britannic Majesty's Supreme Court in Egypt, which had then obtained jurisdiction in prize matters, by Order in Council of September 30, 1914, made under an Act of Parliament passed on September 18, 1914 (4 & 5 Geo. 5, c. 79). This conduct constitutes no foundation for saying that he was agent for Captain Gilpin Brown.

With regard to Lieutenant Grogan, somewhat different considerations arise. His duty towards the cargo owners was the duty of the Crown, that is to say, the duty of preserving the property pending adjudication by the Prize Court. Only if in discharging the cargo he committed a breach of this duty can he be liable for any loss entailed thereby on the cargo owners. The Prize Court is the proper tribunal to determine whether the circumstances did or did not, according to international law, justify the discharge. If Lieutenant Grogan had, as it is contended he should have done, applied to the Prize Court for leave to land the cargo, the same question would have arisen for determination. If the circumstances were such that the Court, if applied to, would have authorized the discharge of the cargo, the cargo owners can have suffered no damage by reason of the fact that Lieutenant Grogan did not make any such application. Their Lordships cannot accept the contention that the necessity of an application to the Court before landing a prize cargo is so clearly a rule of international law that a neglect to make the application must in all cases render the officer responsible for the landing liable for a breach of duty. Such a rule would not be in the interests of the owners of the captured property. The circumstances may be such that prompt action is necessary in the interests of all concerned. In such cases the officer in charge of the property must act on his own responsibility. If there be no justification for landing the cargo, and the owner is prejudiced

thereby, he has his remedy in the Prize Court. If the landing of the cargo is justified, the owner has no cause of complaint. The irregularity, if any, committed by the officer responsible for the landing in not having first obtained the leave of the Court is in that case a mere technical breach of duty.

In the present case there can, in their Lordships' opinion, be no reasonable doubt that if an application had been made to the Prize Court it would have authorized Lieutenant Grogan to do what he in fact did. The steamship *Südmark* was undoubtedly a German vessel captured at sea, and therefore clearly liable to condemnation. The liability of the cargo to condemnation was in doubt. It depended upon whether its presumed enemy character could be displaced by evidence. But it was quite certain that it could never leave Alexandria on board the *Südmark*. It would have to be transhipped or landed. The captain, in the interests of the cargo owners, was pressing for an immediate landing on the ground that it would deteriorate if left on board. Under circumstances such as these it is the usual, if not the invariable, course for the Prize Court to order a cargo to be landed and stored on shore. Their Lordships cannot discover any circumstance which might have induced the Prize Court to depart from the usual practice. If applied to, it would have authorized Lieutenant Grogan to do what he in fact did.

Further, their Lordships are of opinion that the delay, necessarily incident to an application to the High Court in this country, for leave to land the cargo was, under the circumstances, a sufficient justification for landing the cargo without obtaining such leave. But even if Lieutenant Grogan were guilty of a breach of duty in not obtaining the leave of the Prize Court to discharge the cargo, it is difficult to see how the damage subsequently incurred by reason of the fire was in any way consequent on such breach. Captors or other executive officers of the Crown in possession of property seized as prize may properly be likened to bailees, if there be a question as to the amount of care they are bound to exercise, but the likeness cannot be extended beyond this point. Bailment is a matter of contract, and the measure of damage in the case of a breach of contract may be very different from the measure of damage in the case of a breach of duty which in no way arises out of

J. C. 1918 — THE SÜDMARK (No. 2).

contract. In their Lordships' opinion *Lilley* v. *Doubleday* (1) cannot be relied on in the present case.

It was suggested that if an application had been made to the Prize Court the appellants would in some way or other have obtained the advantage of some insurance effected or to be effected by the Prize Court marshal. This may or may not be the case, but their Lordships are quite satisfied that there is no obligation on the part of the Crown or its executive officers, or the Prize Court marshal, to effect insurances against fire for the benefit of cargo owners, whether the cargo be landed or kept on board a captured ship. The loss of some possible advantage arising out of insurance usually effected in the interest of the Crown cannot therefore be made an item of damage for the breach of duty which Lieutenant Grogan is said to have committed.

For the reasons above indicated their Lordships are of opinion that the order appealed from was erroneous and ought to be discharged. Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, with costs here and below.

Solicitor for appellants : *The Treasury Solicitor.*

Solicitors for respondents : *Linklater, Addison & Brown ; Thomas Cooper & Co.*

(1) 7 Q. B. D. 510.

[PRIVY COUNCIL.]

STOLLMEYER AND OTHERS . . . . . APPELLANTS;

AND

TRINIDAD LAKE PETROLEUM COMPANY, LIMITED, AND OTHERS . . . . . RESPONDENTS.

J. C.* 1918 *Feb.* 4.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Trinidad—Watercourse—Stream exclusively fed by Rainfall—Cessation of Flow in Dry Season—Riparian Rights—Petroleum Mining Industry—Sensible Diminution and Pollution—Absence of Damage—Declaration of Right—Time to abate Nuisance—Liberty to apply for Injunction subsequently.

A stream which flows in a permanent defined channel, although it is fed exclusively by rain water running off the surface of the land and ceases to flow during a considerable part of each year, is a watercourse; an owner of land upon its bank is consequently entitled to have the natural flow of the water without sensible diminution or increase (subject to the lawful rights of upper riparian owners) and without sensible alteration in its character or quality.

In applying the English law as to watercourses to the circumstances of a very different country, and particularly to a tract of land which is of great value as a petroleum area, and of little value in any other connection, regard must be had to those circumstances in moulding the remedy to be granted to a riparian owner, and in considering whether there has been a sensible diminution or pollution of the water; but the distinction between injuria and damnum is fundamental.

A stream of the above description flowed through lands the whole of which belonged to the respondents with the exception of a plot, situated at its mouth, which belonged to the appellants. The appellants' land was unsuitable for agriculture and was not used for any purpose. The respondents carried on upon their land the business of boring for oil, which was the sole industry of the locality. For the purpose of that business, and in order to supply water to other properties which were not riparian, the respondents diverted part of the water of the stream, and thereby sensibly diminished the flow of water past the appellants' land they also, without negligence, caused by their works a sensible

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD WRENBURY.

J. C.
1918
STOLLMEYER
v.
TRINIDAD
LAKE
PETROLEUM
COMPANY.

pollution of the water by oil and salt. The appellants had suffered no pecuniary damage, and the Courts in Trinidad dismissed an action by them for damages and an injunction :—

Held, that the appellants' rights were being infringed, and that they were consequently entitled to relief ; that under the circumstances of the case there should be declarations as to their rights, but that no injunction should issue until the respondents had had time to execute works which would enable them to conduct their operations differently ; that it should be ordered accordingly that, the respondents undertaking to pay from time to time any pecuniary damage which the Court of first instance should find that the appellants had suffered, the appellants should have liberty to apply to that Court for an injunction after a period of two years.

APPEAL from a judgment of the Supreme Court of Trinidad and Tobago (January 25, 1916) affirming the judgment of the Chief Justice.

Under the circumstances stated in the judgment of their Lordships the appellants sued the respondents in the Supreme Court for damages for the wrongful diversion and pollution of a stream in Trinidad known as the Vessigny river, in which they claimed to have the rights of riparian owners ; they also claimed an injunction in respect of the alleged diversion and pollution.

Lucie Smith C.J., the trial judge, dismissed the action. He held that the appellants had the rights of riparian owners in the water. He found that the appellants always had the same amount of water and that there was no material increase of salinity ; that a small amount of oil found its way from the works into the river, but not from any negligence of the respondents ; that the whole district was an oil district. He was of opinion that if the respondents carried on their business in a proper manner, as they did, they were not responsible for oil finding its way by gravitation into the water ; and that there being no known method of controlling a "gusher" of oil, if an injunction were granted it would stop the whole oil industry in a district in which oil was the only industry.

Upon appeal to the Full Court the learned judges (Blackwood-Wright and Russell JJ.) differed ; the judgment of the Chief Justice was consequently affirmed.

Blackwood-Wright J. was of opinion that although the abstraction of the water might be very slight, it constituted a violation of the

appellants' rights; also that as some pollution was admitted it was no answer in law that the respondents were working their property in a careful and proper manner. He considered that the appellants were entitled to an injunction. Russell J. agreed with the Chief Justice that the action failed. In his opinion the Vessigny was not in law a river or watercourse so as to render applicable the ordinary rules as to the rights of riparian owners inter se.

1917. Nov. 6, 9, 13, 16. *P. O. Lawrence, K.C.*, and *Bowstead*, for the appellants. The Vessigny flows in a defined channel and is therefore a watercourse the subject of the usual rights of its riparian owners: Angell on Watercourses, ch. 1, s. 4. The rights of riparian owners in a stream extend to that part in which the tide flows and reflows: *Lyon* v. *Fishmongers' Co.* (1); *North Shore Ry. Co.* v. *Pion* (2); Callis on Sewers, 1823, p. 95. The appellants are entitled to have the natural flow without sensible diminution or pollution: *Young & Co.* v. *Bankier Distillery Co.* (3); *Chasemore* v. *Richards.* (4) The evidence shows that the respondents diverted part of the stream, and that they polluted the water. It is no answer to say that the respondents were developing their property without negligence: *Pennington* v. *Brinsop Hall Coal Co.* (5); *Smith* v. *Kenrick* (6); *Baird* v. *Williamson.* (7) The respondents' acts did not constitute a reasonable exercise of their rights of user: *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (8) Nor is it any answer to say that the appellants suffered no damage. The appellants' legal rights are being infringed, and they are consequently entitled to an injunction: *Imperial Gas Light and Coke Co.* v. *Broadbent* (9); *Jones* v. *Llanrwst Urban Council.* (10) They should not be left to bring a succession of actions for damages.

Hogg, K.C., and *F. O. Robinson*, for the respondents. To constitute a watercourse there must be a bed, banks, and flow, though not necessarily an uninterrupted flow. Upon the evidence the flow of water in the Vessigny was not such as to make it a watercourse the subject of riparian rights. Surface water which intermittently flows

(1) (1876) 1 App. Cas. 662.
(2) (1889) 14 App. Cas. 612.
(3) [1893] A. C. 691.
(4) (1859) 7 H. L. C. 349, 381.
(5) (1877) 5 Ch. D. 769.
(6) (1849) 7 C. B. 515.
(7) (1863) 15 C. B. (N.S.) 376.
(8) (1875) L. R. 7 H. L. 697.
(9) (1859) 7 H. L. C. 600, 612.
(10) [1911] 1 Ch. 393, 402.

J. C.
1918
STOLLMEYER v. TRINIDAD LAKE PETROLEUM COMPANY.

through a ravine does not in law constitute a watercourse: Angell on Watercourses, ch. 1, ss. 4, 4 (*f*); *Bowlsby* v. *Speer* (1); *Hoyt* v. *City of Hudson* (2); there is no authority to the contrary. The physical and economic conditions of the locality in question differ materially from those to which the English decisions relate; the law as to watercourses as laid down in England must be adapted to those conditions: *Srinath Roy* v. *Dinabandhu Sen.* (3) If, however, the appellants have the rights of riparian owners, there has been no infringement of those rights. The evidence shows, and it was found below, that there was no sensible diminution of the flow past the appellants' land. The alleged pollution was of a slight character. The business of oil boring is a natural use by the respondents of their land; provided they carry on their works in a proper manner, which they do, they are not responsible if some oil finds its way into the water: *Wilson* v. *Waddell* (4); *West Cumberland Iron and Steel Co.* v. *Kenyon.* (5) The principle of those decisions applies to a case of pollution arising from a proper working of the oil. But even if the appellants had suffered a legal wrong an injunction was properly refused in the circumstances. It is not an unvarying practice for the Court to restrain by injunction an infringement of the rights of a riparian owner: *Ormerod* v. *Todmorden Mill Co.* (6); *Earl of Harrington* v. *Derby Corporation* (7); *English* v. *Metropolitan Water Board.* (8) So, too, a breach of covenant will not be restrained if the result will be to do much more injury to the defendant than benefit to the plaintiff: *Doherty* v. *Allman.* (9) Having regard to the very serious injury which an injunction would do to the respondents' business, the only local industry, and to the fact that the appellants are not using their land and have suffered no pecuniary damage, no injunction should be granted. The appellants' rights would be sufficiently protected by a declaration of their rights; thereon they could recover damages if hereafter they should suffer any.

Bowstead replied.

(1) (1865) 86 Amer. Decisions, 216.
(2) (1871) 9 Amer. Rep. 473.
(3) (1914) L. R. 41 Ind. Ap. 221, 243.
(4) (1876) 2 App. Cas. 95.
(5) (1879) 11 Ch. D. 782.
(6) (1883) 11 Q. B. D. 155, 162.
(7) [1905] 1 Ch. 205.
(8) [1907] 1 K. B. 588, 603.
(9) (1878) 3 App. Cas. 709, 721.

1918. Feb. 4. The judgment of their Lordships was delivered by

LORD SUMNER. The river Vessigny is formed by the water collected in a number of steep gullies or ravines in a hilly scrub-clad district in Trinidad and empties into the Gulf of Paria. The whole area within the watershed belongs to the respondent company, except a part of a small estate of about 100 acres in all called Merrimac, which is situated on both banks of the river at its mouth, and belongs to the appellants. The whole region contains petroleum deposits at various depths below the surface, and it is this fact which makes the properties valuable. Merrimac may be susceptible of some kind of cultivation, but its value substantially depends on the prospect of working petroleum there in the future. The respondents have worked petroleum in their area extensively for some years past. Its surface is covered with low tropical jungle, and was of so little value that it remained unexplored until petroleum was prospected for. Throughout the region there are no water springs, and the supplies of water required for engines and boilers and for the personal use of workmen and otherwise must be obtained from the rain water, which either runs off the surface as it falls or is held up for a time in the surface soil by the dense tropical vegetation which grows there. The main river is described as being about four miles long. In the upper part of the basin the fall is steep. Near the sea the land is flat, so much so that although the tide only rises $2\frac{1}{2}$ feet at neaps and 4 feet at springs, it runs up the river to a distance of 300 yards from the mouth. The whole frontage of Merrimac is on the tidal portion of the river. At the mouth the sand forms a natural bar. Whether at any state of the tide the bar dries altogether and cuts off the water within from the gulf without appears to be in dispute, but the river is at any rate shallower at the bar than at any other point along the frontage of Merrimac and at low water is no doubt very shallow indeed, while a little higher up the basin is several feet deep and at high tide is of considerable width.

A few years ago the respondents constructed two dams on their own ground—one on the upper part of the main channel of the Vessigny and the other on a lateral ravine called the Tobago ravine. During the wet season, which lasts about 200 days in the year, rain falls copiously and with violence to about 80 inches altogether. The greater part of it runs rapidly away, and even the portion which

J. C. 1918 STOLLMEYER v. TRINIDAD LAKE PETROLEUM COMPANY.

is retained by the scrub and other vegetation does not take long to exhaust. During the dry season of about 100 days, the streams are often dry altogether, after an intermediate period, when there is first a mere trickle and then only a chain of isolated pools. Evaporation in that climate is considerable.

As a plentiful and still more a uniform supply of water of some sort is required for the business of working these petroleum fields it was necessary for the respondents to make these reservoirs. They were most easily constructed by damming the bottom of a ravine at a point where a dam would control a considerable catchment area. In the result the two reservoirs are capable of holding about 25,000,000 and 5,000,000 gallons respectively. One of them impounds the water from 545 acres out of 1780 acres, the entire area of the basin. When the reservoirs are full the surplus water escapes by a spillway provided for the purpose on the top of each dam, which can be regulated as desired. The respondents or their subsidiary companies now work numerous oil wells both within the Vessigny basin and in other areas, situated at a distance and naturally waterless. For these purposes they (*a*) pump water away from the Vessigny basin to the other properties; (*b*) use water from the reservoirs for the purpose of operations on the riparian properties within the basin; and (*c*) return a portion of this last-mentioned water into the Vessigny river, impregnated with oil as the result of its use. It is of these things that the appellants complained in this action, alleging that as lower riparian proprietors their rights in the water of the Vessigny river were injuriously affected by the acts of the respondents in damming the watercourse and interfering with the natural flow of the water, in abstracting water for purposes and properties not within their rights as upper riparian proprietors, and by polluting the water generally in working their petroleum properties.

The respondents have argued that the Vessigny river is not such a river or natural watercourse that its lower riparian proprietors can complain of anything they may do in dealing with such water as falls on their own lands. Here the decision of the Chief Justice was against them, and their Lordships see no reason to question that decision, nor is this the substantial point in the present case. Certain it is that the Vessigny river and its network of ravines

constitute a natural system of permanent and defined courses for water. Sometimes there is no water in these watercourses, and sometimes what there is does not course, nor are they ever fed by springs; but these circumstances are not critical. A river may be fed by the rains directly, without any intermediate collection of the water in the bowels of the earth, and still be a river, and a river which naturally runs during a good part of the year does not cease to be a river merely because at times it is accustomed to become dry. When the general legal tests, which decide the question whether a watercourse is such that the water in it is the subject of riparian rights, have been applied correctly, as they were here, to the particular features of the watercourse in question, the conclusion is one of fact not lightly to be interfered with, and their Lordships accept it.

The learned trial judge, Lucie Smith C.J., finds: (1.) "I do not think the rights of the plaintiffs have in any material way been affected by the defendants' works. They always have the same amount of water. There may or may not be a slight difference as to the amount of salt in the water, but not in such a material way as, in my opinion, is sufficient to grant an injunction." (2.) "Most of the oil found its way to the watercourse from a gusher which it is impossible to control; a certain amount comes from the rain washing the ground by the wells and from droppings from oil pipes. It is admitted that the defendants carry on their industry in the most approved manner, and I believe that a small amount of oil must find its way from the works by drainage to the watercourse, but it is not owing to any negligence of the defendants that it does so." Of the alleged pollution of the water, which is returned to the stream after being abstracted and used on the defendants' riparian premises, he says nothing. In the course of the proceedings he had visited and viewed the locus in quo.

"The law relating to the rights of riparian proprietors," said Lord Macnaghten in *Young & Co.* v. *Bankier Distillery Co.* (1), "is well settled. A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors,

(1) [1893] A. C. 691, 698.

J. C. 1918

STOLLMEYER v. TRINIDAD LAKE PETROLEUM COMPANY.

and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to form a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court." Under the circumstances of this case it is difficult to suppose that, after the respondents had constructed their dams and had begun to use them, the Vessigny still came down to Merrimac without sensible diminution at least of its flow, and hence the use by the trial judge of the adjective "material" instead of the adjective "sensible" seems significant. Russell J., the member of the Court of Appeal who upheld the judgment of Lucie Smith C.J., seems to have understood it in this sense, for he observes: "With regard to the general merits of the case, I am inclined to agree with the Chief Justice. A degree or two of difference in the degree of salinity in the water flowing past the plaintiffs' mangrove swamp at low tide seems to me a matter which is practically negligible. It is not now, and it is practically inconceivable that it ever should be, a sensible injury. *Kensit* v. *Great Eastern Ry. Co.* (1) seems to me to some extent an analogous case. It is true that there a comparatively small quantity of water was taken, and that practically all was returned undeteriorated in quality, whereas here a very large body of water is taken, and not returned. That makes the present case a much more difficult one. But the principle there in effect laid down applies, viz., that a man will not be allowed to invoke the law simply to injure his neighbour, where the infraction of rule of which he complains really does not concern him, being of such a nature that he cannot be injured thereby." It is the fact that at present the plaintiffs' land at Merrimac is worth nothing as agricultural land, though it is hoped that, if some one were willing to buy the property in spite of its insignificant size, and then were lucky enough to find oil by boring within its borders, a considerable sum might be paid for it and be money well laid out. If, as seems possible, these learned judges were impressed with the character of the plaintiffs' cause of

(1) (1884) 27 Ch. D. 122.

action as a barren assertion of legal right, crippling the only local industry without affecting their own pecuniary position, the use of the word "material" and the contrast of a "sensible injury" with "the infraction of a rule which really does not concern him" would be at once accounted for.

From the undisputed facts the following conclusions may be arrived at: (1.) While the reservoirs are filling, the amount of fresh water flowing below must be sensibly diminished, and it is not shown that, in the comparatively short distance between them and Merrimac, either evaporation or absorption by the vegetation and the surface soil would have had the same effect in any case. When the reservoirs are full, and the spillways are passing any further water which enters the reservoirs, the flow of the stream below, which is thus restored, takes place nevertheless at a different time from that at which it would have taken place if there had been no dams to interfere with it. (2.) The quantity abstracted every day and never returned, but sent to other properties, and, indeed, sold, is in itself sensible, for it is measured by tens of thousands of gallons. In comparison with the total volume of water which feeds the Vessigny river it might conceivably be so inconsiderable as to be called colloquially "insensible." No doubt to the volume falling from the skies must be added the volume coming in from the gulf to feed the lower Vessigny; but that is confined to the quantity, which will enter over a bar, that nearly dries at low tide if it does not actually do so, and spans a river of small width. When all these allowances are made, the quantity which the respondents convey away altogether can hardly be said to cause no sensible diminution. (3.) During many hours out of every twenty-four the influx of the sea keeps a considerable volume of water in the channel of the Vessigny in front of Merrimac, and would do so whether the river water was coming down to mingle with it or not. Let it be assumed that during these hours the presence of a greater or less volume of fresh water is material only to salinity, though it does not appear that the wide river channel in this neighbourhood could not well accommodate the increase caused by the entrance of greater quantities of fresh water. Still it seems clear that, at low water and for some substantial period before and after the turn of the tide, the basin opposite Merrimac can hold

J. C. 1918

STOLLMEYER v. TRIN DAD LAKE PETROLEUM COMPANY.

only its minimum volume of sea water, and that an abundant flow of river water, or even such an increase as would occur if the respondents abstracted no water above, might well produce a sensible, and probably a substantial, rise in the water level at that time and in that place. (4.) It may be that at all states of the tide, and in all stages of the river water, the salinity of the water opposite Merrimac is so high that the water is useless for domestic purposes, and also for boiler purposes, unless it is subjected to some special treatment, or unless at the risk of deteriorating the boiler. Still it cannot be said, except as a mere speculation, that the expenditure of money or the advance of scientific knowledge might not within a reasonable time make it possible to derive benefit from even this salt water for both purposes. The witnesses made various suggestions on the subject. Whatever merit those suggestions have commercially, they at any rate point to directions in which it is not impossible that the appellants might seek and find relief from the natural disadvantage of the brackish water, which adjoins their banks.

In view of these considerations, their Lordships think that it is impossible to hold that what the respondents admittedly do occasions no sensible diminution in that enjoyment of the stream, to which the possession of Merrimac entitles the appellants if and when they develop their property. There can be no doubt that if the respondents have caused such sensible diminution and this violated the appellants' rights, they cannot excuse or defend their wrong by showing how disproportionate is the loss which they will suffer by being restrained to any loss which the appellants have suffered or are likely to suffer by their wrongful acts, or by dwelling on the general importance of the enterprises, which, if they cannot obtain a supply of water, must promptly come to an end. These considerations may be relevant to the form of the remedy, especially to the time and opportunities which should be given them for finding some way out of their difficulty, but they cannot operate to deprive the appellants of their right to have their wrong redressed, if wrong has been done them.

In the similar case of *McCartney* v. *Londonderry and Lough Swilly Ry. Co.* (1) the House of Lords made a declaration which

(1) [1904] A. C. 301.

their Lordships propose to follow. The declaration will be that the respondents are not entitled to use the water of the Vessigny or its tributaries for the purpose of supplying it or selling it to undertakings not carried on upon their riparian properties. The appellants do not ask for the removal of the dams, saying, as indeed is plain, that they will be well content with regulation of the overflow, so as to secure to them an adequate and constant body of water, and this the respondents will be able to ensure.

There remains the question of pollution. It takes two forms: Firstly, it is alleged that the water returned to the Vessigny after the respondents have used it on their riparian property is polluted with oil. The quantity of this water, as has been said, is considerable. Secondly, it is alleged that in the course of boring for and pumping oil on their own property the respondents spill oil on the surface, and thus the ordinary drainage of surface water during the rains into the Vessigny river and its ravines comes to be drainage of polluted water, which affects the lower course of the river. As to this the trial judge appears to be of opinion that most of this pollution is due to a "gusher which was struck by the respondents in the ordinary course of boring, and could not by any known means have been controlled." It seems fairly clear that gushers are uncontrollable at first, and for a time run to waste, and that in their own interest the respondents would stop this waste as soon as possible; but it is by no means clear that there is any evidence of any such gusher flowing at the time in question. The rest the trial judge seems to trace to drainage of oil from the respondents' works. There is evidence that in this petroliferous region there is, apart from artificial borings, some natural escape of oil, and a modicum of oil on the river makes an appearance and perhaps a reality of extensive pollution, but the ground on which the learned trial judge and Russell J., who agreed with him on appeal, decide to proceed is that this region is useless except for winning oil, but for that purpose is valuable and a subject of public interest, that gushers may be struck at any moment and cannot be avoided, and that the respondents' operations are carefully conducted. Hence, it is concluded, there being no negligence proved against them, an injunction would stop their industry altogether, and, as the appellants' injury,

J. C. 1918

STOLLMEYER v. TRINIDAD LAKE PETROLEUM COMPANY.

if any, is accompanied by insignificant damage, they cannot be allowed to complain so as to interfere with the respondents' enterprise. Alike on the evidence and on the judgments, it must be confessed that in this respect matters are left in an unsatisfactory position.

If the Vessigny river is naturally polluted with escapes of oil and any additional pollution due to the respondents' workings is either insensible or so slight that the maxim de minimis non curat lex can apply to it, the appellants fail. If, again, the pollution, such as it is, arises simply because the rain water falls on an oily surface and, running over it till it reaches the defined channel or watercourse, collects there and flows away as oily water, the appellants would again fail. The respondents are not bound to abstain from a normal use of their own ground merely in order that it may remain as clean a catchment area for the rainfall as it was in its virgin state. In the course of the proceedings the respondents abandoned any claim to rely on the natural escape of oil, independently of artificial working, as the explanation of the appellants' grievances, and their engineer in his evidence admitted that there was considerable pollution by the working of the oil wells. On the other hand, Mr. Charles Stollmeyer admitted in cross-examination that when it rains the water is "pea-soupy," and said "up where dam is it is drinkable, not down where I am—never has been." The oil is not suggested to make the water unsuitable for boiler purposes, but, although the water is naturally undrinkable, it may be polluted for other domestic purposes by reason of the oil. Their Lordships think that it must be taken that the pollution from oil is not such as, in an ordinary region, an upper riparian proprietor would be entitled to inflict upon a lower one, except by prescription.

In their case the respondents actually put their contention thus: "The district is an oil district, and the respondents' business of oil mining and boring is a natural use of their lands, and they are entitled to carry on their business, provided they do so in a usual and proper manner, notwithstanding that as a result thereof some oil mingles with the rain water, which at times flows along the ravine known as the Vessigny river."

Their Lordships are prepared to recognize that in applying English law, which is the law governing this case, to the circum-

stances of a very different country and particularly to a tract of land which has great value as a petroleum area and little in any other connection, regard must be had to such special circumstances alike in moulding the remedy to be granted and in measuring the amount of change which might take place without its being necessary to hold that the lower riparian rights were sensibly affected by the upper riparian operations. They think, however, that the difference between injuria and damnum is in this connection fundamental. (1) It would not be an application of English law to Trinidad, but an abandonment of it, to hold that an invasion of the appellants' rights must go without remedy, unless it is accompanied by present and substantial damage. Still less can it be called an application of the maxim sic utere tuo to Trinidad to say that while in England a landed proprietor must not discharge his own filth on to his neighbour's land at all he may do so in Trinidad, if only he is careful about it and does it for his own benefit. They are accordingly of opinion that, in respect of the claim for pollution by oil, the appellants are entitled to a declaration similar to that in respect of abstraction of water, namely, that the respondents are not entitled to allow oil from their workings to flow into the river Vessigny or its tributaries so as to cause pollution to the water of the river flowing through a part of the appellants' lower riparian property called Merrimac.

Their Lordships are, however, of opinion that no injunction should go forthwith. The declarations will safeguard the appellants' rights, and no pecuniary harm worth mentioning is being done at present. The respondents, by their counsel, have given an undertaking to pay from time to time any damage actually found by the Court of first instance to have been suffered by the lower riparian property, and, in their Lordships' opinion, they ought to have a reasonable and ample time within which to find some means of securing themselves in their operations. They may be able to intercept the water required before it has reached the Vessigny, so as to become the subject of rights in the appellants at all. They may be able to intercept the oil, which they set free, before it reaches the river. If so, time will be required for the necessary works. It will be sufficient to give to the appellants liberty to apply for

(1) See, further, the judgment of their Lordships in *Stollmeyer* v. *Petroleum Development Co.*, immediately following.

J. C. 1918 STOLLMEYER v. TRINIDAD LAKE PETROLEUM COMPANY.

injunctions to the Court of first instance after a period of two years. Of course, the respondents must pay the costs here and below. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *Maples, Teesdale & Co.*
Solicitors for respondents : *Ashurst, Morris, Crisp & Co.*

NOTE.

STOLLMEYER *v.* PETROLEUM DEVELOPMENT COMPANY, LIMITED.

APPEAL from a judgment of the Supreme Court of Trinidad and Tobago (January 4, 1916) affirming the judgment of Russell J.

The respondents and the appellant were respectively upper and lower riparian owners upon a stream known as the Vance river in Trinidad. They carried on upon their respective lands the business of boring for oil. The appellant sued for an injunction to restrain the respondents from polluting the stream with oil and salt water, and for damages.

Russell J., the trial judge, found that the respondents had polluted the water with both oil and salt water ; he awarded them 50*l.* damages, but refused to grant an injunction.

The appellant appealed to the Full Court against the refusal to grant an injunction. Lucie Smith C.J. agreed with that refusal. Blackwood-Wright J. was of opinion that the respondents should be restrained from pumping salt water so as to flow into the stream. The learned judges thus differing, the judgment was affirmed.

1917. Nov. 2, 5, 6, 16. *P. O. Lawrence, K.C.*, and *Bowstead*, for the appellant.

Hogg, K.C., and *F. O. Robinson*, for the respondents, referred to the cases cited in the above reported appeal as to the right to an injunction, and contended that in the circumstances of the case no injunction should be granted.

1918. Feb. 4. The judgment of their Lordships (Lord Parker of Waddington, Lord Sumner, and Lord Wrenbury) was delivered by

LORD SUMNER. In this case a lower riparian proprietor's rights in the unpolluted flow of water in a watercourse have been violated by an upper riparian proprietor in the course of working the upper lands, and will continue to be so violated unless the latter takes steps to stop the nuisance, which he contends are commercially impracticable. The question is whether the injured party must rest contented with a judgment for accrued damages and the right to sue for further damages from time to time, or is forthwith entitled to an injunction in support of his right. The Courts below (Blackwood-Wright J. dissenting) have held the former.

There is some evidence that, independently of any commercial working, a certain amount of petroleum oozes out of the ground and finds its way into the stream. To that extent the appellant's rights are rights in a flow of oily water, but the fact gives the respondents no right to make it more oily themselves. The only result is that they cannot be required to prevent the escape of oil into the stream, in so far as it is entirely due to natural causes.

It is also contended that volumes of salt water, which frequently escape from subjacent strata when the respondents have penetrated them with their bore-holes, find their way into the stream independently of any pumping operations which the respondents carry on, or of any constructional works which they have put up, and that for the consequent pollution by salt the respondents cannot be held responsible. In their Lordships' opinion the evidence does not establish this point. Even if it be assumed that salt water, forced to the surface by natural pressure through the respondents' bore-holes, would in any case flow down to the bottom of the ravine where the stream runs, and would not be evaporated or absorbed on the way, which is by no means clear, the fact remains that the dams and reservoirs of the respondents hold up this salt water in the bed of the stream, and then it finds its way into the appellant's part of the stream either by overflowing the top of the respondents' tank or by being liberated through sluices at the bottom. Their Lordships are satisfied that in effect the respondents do direct both oil and salt water into the lower part of the stream, and are therefore responsible for infringing the appellant's rights, and that nothing further can be necessary than to limit the injunction to restraining such pollution as is due to the respondents' acts, and is not caused independently by the natural local conditions and the natural escape of oil or brine.

The grant of an injunction is the proper remedy for a violation of right according to a current of authority, which is of many years' standing and is practically unbroken : *Imperial Gas Light and Coke Co.* v. *Broadbent* (1) ; *Pennington* v. *Brinsop Hall Coal Co.* (2) In *English* v. *Metropolitan Water Board* (3) there is a mere dictum to the contrary. The discretion of the Court in the grant of such injunctions is regularly exercised in this sense. Their Lordships see no reason to depart from so uniform a practice, and although they fully appreciate the reluctance expressed by the Courts of Trinidad, in view of the special circumstances of the petroleum industry, they do not think that they differentiate the present from other cases. There must be an injunction, therefore, to restrain the respondents from pumping from their wells or suffering to escape from their impounding tanks or reservoirs or otherwise discharging oil or salt water in such a way that they or either of them shall reach the river Vance or its tributaries so as to pollute the water thereof to the nuisance or injury of the appellant.

(1) 7 H. L. C. 600, 612. (2) 5 Ch. D. 769.
(3) [1907] 1 K. B. 588, 603.

J. C.
1918
STOLLMEYER v. TRINIDAD LAKE PETROLEUM COMPANY.

Their Lordships are, however, of opinion that it would not be right to enforce the injunction at once. The loss to the respondents would be out of all proportion to the appellant's gain, and on the respondents undertaking, as they have done, to pay from time to time such pecuniary damages as their work may be found to have caused to the appellant on an inquiry before the Court of first instance, they think that justice will be done if the operation of the injunction be suspended for two years to give an ample opportunity to the respondents to carry out any works necessary to remove the causes of complaint, with liberty to apply to the Court of first instance for a further suspension if special grounds can be shown. The respondents must, of course, pay the costs here and below.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Maples, Teesdale & Co.*
Solicitors for respondents: *Ashurst, Morris, Crisp & Co.*

[PRIVY COUNCIL.]

J. C.*
1918
Feb. 4.

THE PRINZ ADALBERT.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—German Merchant Ship—British Port—Outbreak of War—Hague Convention, VI., Preamble, arts. 1, 2—*Form of Order.*

The preamble to the Sixth Hague Convention states that the contracting parties "anxious to ensure the security of international commerce against the surprises of war, and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities, have resolved to conclude a Convention to this effect." By art. 1 of the Convention it was stated to be desirable that a merchant ship in an enemy port at the outbreak of hostilities should be allowed to depart freely either immediately or after a reasonable number of days of grace; and by art. 2, that if, owing to circumstances beyond her control, the ship had not been able to leave the port within that period, or had not been allowed to leave, she might not be confiscated, but merely detained.

On August 3, 1914, a German liner bound from Philadelphia to Hamburg with passengers and cargo, having heard of the outbreak of war between France and Germany, put into Falmouth for orders. On the morning of August 4 the master was told by the Customs authorities that his vessel would not be allowed to

---

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

leave. About 4 P.M. on that day he was told that the vessel was unconditionally released, but no steps were taken by the master indicating an intention to leave. From 11 P.M. on August 4 a state of war existed between Great Britain and Germany; on the following morning the vessel was seized as prize. She was subsequently condemned on the ground that the Convention did not apply, as the vessel had entered the port in order to avoid French cruisers and not for any commercial purpose:—

Held, their Lordships not proposing to decide at the present time what was the effect of the preamble of the Sixth Convention upon arts. 1 and 2, that an order should be advised similar to that in *The Chile* [1914] P. 212, 217, so as to preserve all rights intact until the conclusion of the war.

The Gutenfels [1916] 2 A. C. 112 followed.

APPEAL from a decree of the President of the Probate, Divorce and Admiralty Division (in Prize). (1)

The appellants, the Hamburg-Amerika Line, a company registered and having its principal place of business in Germany, appealed from the condemnation of their vessel the *Prinz Adalbert*. The vessel was seized at Falmouth on the morning of August 5, 1914, under circumstances which are shortly stated in the head-note, and appear fully from the judgment of the President. (2)

The President (Sir Samuel Evans) on March 23, 1916, condemned the vessel. He found that she did not intend to avail herself of the permission to leave the port, and that she had not entered the port for commercial purposes, but in order to avoid seizure by French cruisers. He held that Hague Convention No. VI. did not apply to the circumstances of the case.

1918. Feb. 1, 4. *Aspinall, K.C.*, and *C. R. Dunlop*, for the appellants. The *Prinz Adalbert* should not have been condemned. The circumstances come within the preamble to the Hague Convention No. VI. It was the duty of the master to avoid war risks as well as marine risks, and in putting into Falmouth he was merely carrying out his duty in relation to the commercial operation: *The San Roman* (3); *The Teutonia*. (4) The appellants ask for

(1) [1916] P. 81.

(2) The appellants also appealed from the condemnation of the *Kronprinzessin Cecilie*, which was seized at Falmouth at the same time and under the same circumstances as the *Prinz Adalbert*. Both appeals were heard together.

(3) (1873) L. R. 5 P. C. 301.

(4) (1872) L. R. 4 P. C. 171.

J. C. 1918

THE PRINZ ADALBERT.

an order similar to that made in *The Chile.* (1) [Reference was also made to the judgments of the Board in *The Gutenfels* (2), *The Marquis Bacquehem* (3), and *The Achaia.* (4)]

Sir Gordon Hewart, S.-G., and *Pearce Higgins*, for the Crown. For the reasons given by the President the Sixth Convention does not apply to the circumstances of the case, and the *Prinz Adalbert* was properly condemned. In any case the provisions of art. 2 never came into operation: *The Gutenfels.* (2)

C. R. Dunlop replied.

The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. In their Lordships' opinion, the effect of the preamble of the Sixth Hague Convention, on arts. 1 and 2 thereof, is a point which admits of considerable doubt. Following, therefore, the precedent of *The Gutenfels* (2) (a decision pronounced after the decisions appealed from), their Lordships do not propose to decide it at the present time. The proper order should, in their opinion, be what is known as *The Chile* order. (1) The effect of making this order will be to reserve all rights intact for decision when the war is over, and the views of the German Government as to the true construction of the Convention can be ascertained.

As the order their Lordships propose to make is that which the appellants ask for in these appeals, and as they have had to come here to get it, the Crown should, in their Lordships' opinion, pay the costs.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Stokes & Stokes.*
Solicitor for respondent: *The Treasury Solicitor.*

(1) [1914] P. 212, 217.
(2) [1916] 2 A. C. 112.
(3) [1916] 2 A. C. 186.
(4) [1916] 2 A. C. 198, n.

[HOUSE OF LORDS.]

H. L. (E.)*
1918
April 25.

McGRORY . . . . . APPELLANT;

AND

ALDERDALE ESTATE COMPANY, LIMITED RESPONDENTS.

Vendor and Purchaser—Open Contract to purchase Land—Specific Performance—Decree—Inquiry as to Title—Objections—Purchaser's Knowledge of Incurable Defects—Waiver—Vendor's Right to adduce Evidence after Decree—Admissibility of Evidence.

Upon an inquiry as to title under an ordinary vendor's decree for specific performance of an open contract to purchase land the vendor is not entitled to adduce evidence to show that the purchaser, when he entered into the contract, knew of the existence of incurable defects in title. Such evidence can be adduced only at the trial of the action.

Decision of the Court of Appeal [1917] 1 Ch. 414 reversed and decision of the Vice-Chancellor of the County Palatine of Lancaster restored.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of the Vice-Chancellor of the County Palatine of Lancaster.

The facts are fully stated in the report of the case before the Court of Appeal, and in the judgment of the Lord Chancellor.

The question raised by the appeal was whether upon an inquiry as to title under an ordinary vendor's decree for specific performance of an open contract for the sale of land the vendor is entitled to adduce evidence to show that the purchaser, before he entered into the contract, knew of the existence of certain defects in the title over which the vendor had no control.

The Vice-Chancellor held that any waiver based upon the knowledge of the purchaser (the appellant) of defects in the title ought to have been pleaded and proved at the trial, and that it was too late to set up any such case upon the inquiry as to title. The Court of

* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

(1) [1917] 1 Ch. 414.

H. L. (E.) 1918

McGRORY v. ALDERDALE ESTATE COMPANY.

Appeal held that the evidence proposed to be adduced by the vendors (the respondents) was rightly tendered upon the inquiry as to title and ought to be admitted.

April 9. *Maugham, K.C.*, and *Thomas Clarkson*, for the appellant.

1. It is an implied term of an open contract for the sale of land that the vendor shall show a good title free from incumbrances; this is a legal as well as an equitable doctrine.

2. Evidence may be admitted in such a case, notwithstanding the Statute of Frauds, to identify the parcels and the nature of, and qualifications attaching to, the title as forming part of the facts which both parties had in their minds.

3. Where evidence can be adduced to limit or qualify the title to be shown it must be adduced at the trial, in order to determine whether there is a complete contract or a contract which will be specifically performed.

Where there is an express contract to make a good title the knowledge of the purchaser, at the time of the making of the contract, of an incurable defect in the title, is immaterial, but where there is no such express contract the presumption arising from the fact of the sale may be rebutted by actual knowledge: *Cato* v. *Thompson* (1); and in this case evidence might well have been given at the trial, not to contradict the contract, but to show what the parties had in their minds. But the right to a good title is part of the contract, and the point must be taken at the trial. *Ogilvie* v. *Foljambe* (2), so far as it goes, is in the appellant's favour, because it shows that where reliance is placed on the waiver by the purchaser of his right to a good title a special reference is inserted in the decree for specific performance. *Curling* v. *Austin* (3) decides that under a decree for specific performance in common form it is too late upon the inquiry as to title to add to the decree any special inquiry. That, in substance, is what the vendors are seeking to do here. Some difference of opinion has arisen on the question whether the waiver arising from the purchaser's knowledge of defects in title is to be put on notice or contract, but it is submitted that it forms part of the contract, which would otherwise be for a complete title: *McMurray* v.

(1) (1882) 9 Q. B. D. 616, 619. (2) (1817) 3 Mer. 53, 66.
(3) (1862) 2 Dr. & Sm. 129, 135.

Spicer. (1) In *Upperton* v. *Nickolson* (2) it was held by the Court of Appeal that the question of waiver by knowledge must be determined at the hearing; and see *Clive* v. *Beaumont.* (3) That rule is stated in general terms, and nothing can be found in any of the authorities which points to any distinction between waiver before or after contract. *In re Gloag and Miller's Contract* (4) was a decision upon a vendor and purchaser summons and has no application to the present case; but Fry J. there states the law as follows: "When the contract is silent as to the title which is to be shewn by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by shewing that the purchaser had notice before the contract that the vendor could not give a good title." The use of the word "notice" in that connection is unfortunate, because there may be notice without knowledge, and Fry J.'s dictum must be read in connection with *Bank of New Zealand* v. *Simpson* (5), approved in *Charrington & Co.* v. *Wooder* (6), and "notice" there must be taken to be equivalent to knowledge. The point now sought to be taken by the vendors could have been perfectly well taken at the trial, and it is no longer open to them.

P. O. Lawrence, K.C. (with him *Thomas C. Eastwood*), for the respondents. The respondents do not dispute propositions 1 and 2, and no general question of law is involved in this appeal. In *Ellis* v. *Rogers* (7), both Kay J. and Cotton L.J. base the waiver of the purchaser of his right to a good title on knowledge, not notice, and actual knowledge is relied on by the respondents in this case. Cotton L.J. leaves open the question whether the right to a good title depends on an implied term of the contract or, as Grant M.R. thought in *Ogilvie* v. *Foljambe* (8), is a collateral right given by the law; and see Fry on Specific Performance, 5th ed., p. 184, s. 373. But the respondents are content to treat the right as an implied term of the contract. In order to rebut the implied term of showing a good title it must be established that the purchaser had knowledge

(1) (1868) L. R. 5 Eq. 527, 540-1.
(2) (1871) L. R. 6 Ch. 436, 442.
(3) (1848) 1 De G. & Sm. 397, 406.
(4) (1883) 23 Ch. D. 320, 327.
(5) [1900] A. C. 182, 187-8.
(6) [1914] A. C. 71, 82, 93.
(7) (1885) 29 Ch. D. 661, 666, 671.
(8) 3 Mer. 53.

H. L. (E.) 1918

McGRORY v. ALDERDALE ESTATE COMPANY.

of the defect and that the vendor could not cure it. The inquiry whether a good title can be shown means a good title according to the contract, and the first thing the registrar has to do is to ascertain what the contract is. The decree for specific performance refers to the contract which was made by the parties and no other. But at the trial the appellant repudiated the contract altogether, and, that being the issue, any question of title was irrelevant at that stage. The vendor is not in a position until the abstract is delivered to know what objections the purchaser will take. In all the cases cited the question has been raised by way of defence. The evidence of the appellant's knowledge was tendered at the first practicable moment when the respondents knew that these objections to title would be taken. When there are implied terms to an agreement it is a necessary assumption that there may be circumstances rebutting that implication, and the right time to ascertain those terms is the time when the question first becomes material by the delivery of requisitions.

The House took time for consideration.

April 25. LORD FINLAY L.C. My Lords, this is an appeal from an order of the Court of Appeal reversing an order of the Vice-Chancellor of the County Palatine of Lancaster relating to the conduct of an inquiry as to title.

The action was for specific performance of an agreement for the sale of land by the respondents to the appellant. By the statement of claim the plaintiffs (the present respondents) alleged that the defendant (the present appellant) had entered into a contract for the purchase of land belonging to the plaintiffs on the terms of the following memorandum :—

" Bought of the Alderdale Estate Co. Ld. the whole of the land subject to measurement, approximately twenty acres at the price of 250*l.* per acre.

" April 20, 1915." " P. McGrory."

and claimed specific performance. By his defence the defendant (the present appellant) traversed the allegations of the statement of claim and pleaded that he was to the knowledge of the plaintiffs so drunk at the time of signing the memorandum that he was incapable

of understanding its effect, and, further, that the contract did not comply with the Statute of Frauds.

The Vice-Chancellor on March 10, 1916, made a decree for specific performance, the material part of which is as follows: "This Court doth declare that the agreement dated the 20th day of April, 1915, in the statement of claim mentioned, ought to be specifically performed and carried into execution, in case a good title can be made to the estates comprised therein. And doth order and adjudge the same accordingly. And it is ordered that it be referred to the registrar to make the following inquiries, that is to say: 1. An inquiry whether a good title can be made to the estates comprised in the said agreement. And in case it shall appear that a good title can be made to the said estates: 2. An inquiry when it was first shown that such good title could be made. And it is ordered that the further consideration of this action be adjourned. And the plaintiffs and the defendant are respectively to be at liberty to apply as there may be occasion." No appeal was brought against this decree, and it is not now in question.

The case came on before the registrar on the inquiry as to title, and the appellant raised three objections, namely, that the respondents had no title to the minerals under a portion of the land, that the land was traversed by a public sewer, and that a public footpath crossed it. The respondents proposed to give evidence that the appellant had knowledge of these objections prior to the date of the contract. On objection to the admissibility of this evidence the registrar decided that the evidence might be given, and gave a special certificate to this effect. The Vice-Chancellor, after argument before him, ordered that this certificate should be discharged, and declared that the respondents were not entitled to give such evidence. This decision was reversed by the Court of Appeal, and the present appeal to this House asks that the judgment of the Vice-Chancellor should be restored.

The judgment of the Vice-Chancellor proceeds upon the ground that the decree declared that the agreement of April 20, 1915, should be specifically performed, that the memorandum of that date involved the obligation on the part of the vendor to make a good title, and that if the vendor relied upon waiver of the obligation to make a good title in any respect this ought to have been brought forward at the

H. L. (E.) 1918 McGRORY v. ALDERDALE ESTATE COMPANY. Lord Finlay L.C.

hearing and embodied in the decree. The Court of Appeal took the view that the authorities as to waiver on which the Vice-Chancellor relied had no application to a case in which the objection had been known to the purchaser at the time when he entered into the contract, as that might exclude the obligation to give a good title which would otherwise by law have been implied in an open contract. In their opinion it was open to the registrar to receive evidence to show what the contract was with reference to title.

In my opinion the order of the Vice-Chancellor was right and should be restored.

The law is clear that, if there is a written agreement of sale which expressly provides that a good title is to be made, it is not open to the vendor to prove that at the time of the contract the purchaser knew of a defect in the title for the purpose of leading to the inference that a good title was not to be shown in that particular. This would be to vary a written contract by parol evidence. But, if the contract is open, the obligation which the law would import into it to make a good title in every respect may be rebutted by proving that the purchaser entered into the contract with knowledge of certain defects in the title. The inference in such a case is that he was content to take a title less complete than that which the law would otherwise have given him by implication. In a case of this kind it seems to me to be clear on principle that if the vendor means to rely on such knowledge by the purchaser at the time of the contract he must establish this at the hearing. It is for the Court, not for the registrar, to decide what the contract between the parties was.

The judgments in the Court of Appeal concede that, if the waiver was after the contract and before the hearing, this waiver would have to be established at the hearing, and that the decree should provide only for an inquiry into title as limited by such waiver. The authorities establish this conclusively. I need refer only to the decision of Sir William Grant M.R. in *Ogilvie* v. *Foljambe* (1), to the judgment of Kindersley V.-C. in *Curling* v. *Austin* (2), to the judgment of Malins V.-C. in *McMurray* v. *Spicer* (3), and to the judgment of James L.J., concurred in by Mellish L.J., in *Upperton* v. *Nickolson*.(4)

There is not a trace to be found in any authority of the distinction

(1) 3 Mer. 53.
(2) 2 Dr. & Sm. 129.
(3) L. R. 5 Eq. 527, 540-1.
(4) L. R. 6 Ch. 436.

suggested by the Court of Appeal between such cases of waiver of a defect in title after contract and the case of knowledge of the defect at the time of the contract negativing what would otherwise be the implication of law as to the obligation to make a good title. Indeed, every reason given for the decisions as to waiver after contract applies à fortiori to a case where the vendor seeks to modify the contract by proof of knowledge at the time of the contract in order to rebut what would otherwise be the legal implication as to the title to be shown. The inquiry into title is of course an inquiry into title according to the terms of the contract. What the contract was the Court must ascertain. In the present case the decree is quite definite as to what the contract is, and defines it by reference to the document dated April 20, 1915. It is not disputed that the legal effect of that document is that a good title had to be shown. The defects in the title must have been known to the vendors, and with that knowledge they got the decree for specific performance and a reference to the registrar as to title in accordance with the contract as found by the Court. The effect of the judgment of the Court of Appeal would be that, having got judgment on a particular contract from the Court, they are to be allowed to adduce evidence before the registrar for the purpose of varying its effect as to title.

This appeal should, in my opinion, be allowed with costs here and below.

VISCOUNT HALDANE. My Lords, the real point in this appeal arises as follows.

The respondents sued the appellant for specific performance of an agreement, signed by him and dated April 20, 1915, for the purchase from them of certain land. This agreement was in writing and in these words: "Bought of the Alderdale Estate Co. Ld. the whole of the land subject to measurement, approximately twenty acres, at the price of 250*l.* per acre."

The appellant pleaded that he was drunk and incapable of understanding the agreement when he signed it, and also the Statute of Frauds. The case was tried before the Vice-Chancellor of the County Palatine of Lancaster, who decided the two points relied on by the appellant against him, and gave judgment for specific performance of the agreement, in case a good title could be made,

H. L. (E.) 1918

McGRORY v. ALDERDALE ESTATE COMPANY.

Viscount Haldane.

directed an inquiry whether such a title could be made, and adjourned further consideration. The decree, which was made on March 10, 1916, referred only to the written agreement of April 20, and in their statement of claim the respondents had set up this document as if containing the whole of the contract. Upon proceeding in chambers upon the inquiry so directed the respondents were called on by the registrar to deliver an abstract of their title, and the appellant put in his requisitions on it as delivered. The abstract disclosed that the respondents had no title to the mines and minerals under a part of the land sold, and also that there ran through part of it a public sewer and over part of it a footpath, both of which might interfere with the development of the property. In answer to the appellant's requisitions directed to these points the respondents refused to remedy the defects in title, alleging that the appellant had knowledge of the defects prior to the date of his contract. The appellant objected to the admission of evidence to this effect on the ground that the contract of April 20 was complete in itself and was established exhaustively by the decree, and could not subsequently be modified or added to by importing any terms merely arising by implication from earlier knowledge. On the question being brought before the Vice-Chancellor he decided that the respondents were not entitled to give evidence that the appellant was in possession of knowledge of the defects in title possessed by the appellant prior to entering into the written agreement. His view was that when a decree for specific performance directs an inquiry whether the vendor can make a good title that means a good title according to the terms of the contract, that, in order to see what the contract was, reference must be made to the judgment at the trial of the action, and to that judgment alone so long as unreversed, and that if the vendor wishes to prevent the renewal under the inquiry of objections known or even apparently waived during negotiation preliminary to the contract and the judgment defining it, he must establish such waiver at the trial and take care that the judgment expressly recognizes it. Otherwise, as the only contract which can be looked to as defining the title to be made is that established by the judgment, the law will define the title contracted to be shown as that required by the law as applied to the terms of the contract so established, and to nothing else.

This decision was reversed by the Court of Appeal. That Court held that, as the bargain for title was implied and not expressed, evidence ought to have been admitted to show that, in view of the knowledge of the parties prior to the contract, the usual implication of an obligation to show a full title ought not to be made.

My Lords, no doubt where a purchaser has a right to ask for a full title he may waive that right and be bound by his waiver. But the cases where this occurs are cases in which it is established that since acquiring the right he has waived it. Here that is not established. The right of the purchaser was, in contemplation of law, that conferred by the terms of the decree. Even if there had been other terms or conditions, collateral but yet forming part of the entirety of the agreement come to on April 20, 1915, these could not be set up. The terms of the decree have, in the eye of the law, superseded and excluded all other evidence, and it is too late, if the decree remains unaltered, to try to import new terms in the course of inquiries which follow merely consequentially on the rights which the purchaser has been given as the result of the trial. There is no suggestion that in the present case there was any waiver of right after the judgment which is now the source of the appellant's rights. It does not matter whether these rights arise by the express words of the decree or by terms which the law implies and annexes in the language the decree embodies. The point is that the law annexes them to the contract as evidenced by the judgment, and not to anything earlier or different. The authorities cited at the Bar here and in the Courts below are, as I interpret them, not only consistent with this principle, but express it.

I think that the Court of Appeal were mistaken in their reversal of the decision of the Vice-Chancellor of the County Palatine.

LORD SHAW OF DUNFERMLINE. My Lords, the facts of this case are before the House in the speeches which have just been delivered.

Further consideration of the law and the authorities cited in argument has confirmed me in the opinion that the learned Vice-Chancellor's judgment is entirely correct and I beg to adopt it.

In cases of this kind you start with the decree for specific performance. The time for modification or alteration of the subject-matter of that decree has gone past; if such modification or

H. L. (E.) 1918 McGRORY v. ALDERDALE ESTATE COMPANY. Lord Shaw of Dunfermline.

alteration by reason of alleged waiver or otherwise was desired as being in accordance with the true intention of parties to the contract, that issue should have been the subject of contest in the proceedings for specific performance, and the alteration or modification, whether upon subject-matter or upon title, should have appeared on the face of the decree. Otherwise the decree must stand, with all that the law implies therein, namely, that a good title to the entire subject-matter of the contract shall be given.

The authorities have been cited by my noble and learned friend on the woolsack. They are entirely consistent and they support the Vice-Chancellor's view. In substance they may be summarized in these words of James L.J. Referring to a misapprehension of the judgment of Kindersley V.-C. in *Curling* v. *Austin* (1) James L.J. said: "Whether there be any waiver otherwise, is a question to be determined at the hearing; but the question whether there is a good title appears to me to mean whether there is a good title according to the contract the specific performance of which is decreed at the hearing, whether those words are in the decree or not": *Upperton* v. *Nickolson*. (2) This judgment has been followed ever since.

In the present case the modifications or alterations suggested under the allegation of waiver, are not only (1.) that the land is crossed by a public drainage, but (2.) by certain rights of way. These would or might render the title unmarketable. But finally (3.) a demand is made that there be an exception from the conveyance of the lands of the minerals under a portion thereof. The concession of this last would be equivalent to an exclusion of what is a part, and might, in circumstances very easily figured, be a valuable, indeed the most valuable part, of the very corpus of the property. In my opinion, standing the decree for specific performance, such modifications, or alterations upon, or such an exclusion from, the title would constitute a failure to comply with the terms of the decree and ought not to be sanctioned. I agree.

LORD FINLAY L.C. My Lords, I am authorized to say that my noble and learned friend Lord Atkinson concurs in the judgment which I have delivered.

(1) 2 Dr. & Sm. 129. (2) L. R. 6 Ch. 436, 442.

Lord Parmoor. My Lords, I concur in the judgment of the Lord Chancellor.

Maugham, K.C., for the appellant, asked leave to make a submission with regard to the form of the order as to costs.

The Vice-Chancellor reserved the costs of the motion before him, but the Court of Appeal allowed the appeal with costs, including the costs of the motion before the Vice-Chancellor. If the order of the Vice-Chancellor is restored as regards the substance of the matter, the appellant asks that he should be allowed the costs of the motion before the Vice-Chancellor.

P. O. Lawrence, K.C., for the respondents. The Court of Appeal ordered that the costs, including the costs of the motion before the Vice-Chancellor, should be the respondents' in any event, and the respondents, being wrong, do not now seek to have the costs of that motion reserved; but, this being an interlocutory matter, they ask that there should not be an immediate order for payment of the costs, but that the costs should be the appellant's in any event, in accordance with the course adopted by the Court of Appeal in this case at the instance of the present appellant.

Lord Finlay L.C. We think that the respondents were wrong and that they ought to pay.

Order of the Court of Appeal reversed and Order of the Vice-Chancellor of the Court of Chancery of the County Palatine of Lancaster restored. The respondents to pay the costs in the Court of Appeal and also the costs of the motion before the Vice-Chancellor mentioned in his said order, and also the costs of the appeal to this House.

Lords' Journals, April 25, 1918.

Solicitors for appellant: *Busk, Mellor & Norris, for Slater, Heelis & Co., Manchester.*

Solicitors for respondents: *Hyman Isaacs, Lewis & Mills, for F. O. S. Leak & Pratt, Manchester.*

H. L. (E.)* 1918 May 6.

[HOUSE OF LORDS.]

COTMAN . . . . . APPELLANT;

AND

BROUGHAM . . . . . RESPONDENT.

Company—Memorandum of Association—Construction—Objects Clause—Ancillary Powers—Declaration that all Sub-clauses independent—Ultra Vires—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 3, 17.

The memorandum of association of the E. Company contained an objects clause with thirty sub-clauses enabling the company to carry on almost every conceivable kind of business which a company could adopt. Sub-clause 1 authorized the company to acquire, take over, work, and develop any licences, concessions, estates, plantations, and properties, and in particular four specified licences to collect rubber, balata, and other like substances from the Crown lands of a British Colony; and sub-clause 12 authorized the company to buy or otherwise acquire in any way and hold, sell, or deal with or in any stocks or shares of any company; and the objects clause concluded with a declaration that every sub-clause should be construed as a substantive clause and not limited or restricted by reference to any other sub-clause or by the name of the company, and that none of such sub-clauses or the objects specified therein should be deemed subsidiary or auxiliary merely to the objects mentioned in the first sub-clause.

The E. Company underwrote and had allotted to it shares in the A. Company, and these shares were transferred to the L. Company.

All three companies being in liquidation, the liquidator of the A. Company settled the L. Company on the A list of contributories and the E. Company on the B list in respect of these shares.

On an application by the liquidator of the E. Company to vary the B list by striking out that company's name, on the ground that the underwriting was ultra vires of the company:—

Held, that the memorandum must be construed according to its literal meaning, and that the underwriting was intra vires.

Observations of Lord Wrenbury on the function of the memorandum of association.

Order of the Court of Appeal [1917] 1 Ch. 477 affirmed.

APPEAL from an order of the Court of Appeal affirming an order of Neville J. (1)

* *Present:* LORD FINLAY, L.C., LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD WRENBURY.

(1) Sub nom. *In re Anglo-Cuban Oil, Bitumen, and Asphalt Company, Limited* [1917] 1 Ch. 477.

In November, 1910, the Essequibo Rubber and Tobacco Estates, Limited, which was incorporated under the Companies (Consolidation) Act, 1908, agreed to sub-underwrite 20,000 shares of 10*s.* each in the Anglo-Cuban Oil, Bitumen, and Asphalt Company, Limited (which was being promoted by the London and Mexican Exploitation Company, Limited), and received an allotment of 17,200 shares in the Anglo-Cuban Company. There remained due and owing from the Essequibo Company to the Anglo-Cuban Company the sum of 14,456*l.* odd for unpaid calls in respect of these shares.

On June 25, 1912, an order was made for the winding up of the Essequibo Company, and the appellant was appointed liquidator thereof.

On September 6, 1912, the Essequibo Company transferred the 17,200 shares in the Anglo-Cuban Company to the London and Mexican Company, who failed to pay the amount remaining due thereon.

On November 12, 1912, an order was made for the winding up of the Anglo-Cuban Company.

The respondent, the official receiver, as liquidator of the Anglo-Cuban Company, settled the London and Mexican Company on the A list, and the Essequibo Company on the B list, of contributories in respect of the sum due on the 17,200 shares.

The appellant applied to vary the B list by excluding therefrom the Essequibo Company, upon the ground that upon the true construction of its memorandum of association the application for the shares was ultra vires.

The facts and the material provisions of the memorandum of association are fully set out in the report of the case before Neville J. and the Court of Appeal, and sufficiently appear from the judgment of the Lord Chancellor. Neville J. dismissed the application, and his order was affirmed by the Court of Appeal (Lord Cozens-Hardy M.R., Warrington L.J., and Lawrence J.).

1918. March 22. *Whinney* and *Morle*, for the appellant. It is conceded that the memorandum of association when registered is binding on the Court for the purpose of showing that the company has been duly incorporated, and that this memorandum must be construed as it stands: Companies (Consolidation) Act, 1908, s. 17.

H. L. (E.) 1918

COTMAN v. BROUGHAM.

But s. 9 of the Act indicates that you are to ascertain from the memorandum what is the main purpose of the company and that that main purpose alone may be extended. In *In re German Date Coffee Co.* (1), and again in *In re Coolgardie Consolidated Gold Mines* (2), Lindley L.J. enunciates the principle on which memoranda containing general words are to be construed, and states that the general words must be taken in connection with what are shown by the context to be the dominant or main objects of the company; otherwise they are merely a trap for the unwary; in *Amalgamated Society of Railway Servants* v. *Osborne* (3) Lord Macnaghten assumes that there must be a fair and reasonable statement of what is the main purpose of the company in order to entitle it to the protection accorded by the Act of Parliament; and in *Stephens* v. *Mysore Reefs (Kangundy) Mining Co.* (4) Swinfen Eady J., following the same principle, states that, notwithstanding a declaration similar to that at the end of sub-clause 30 in the present case, wide powers given in general words will be construed as ancillary only to the specific objects of the company. The main purpose of this company is to be found in the first sub-clause, as assisted by the two succeeding sub-clauses, and in the name of the company, which may be used to limit the construction of the memorandum. The main business of the company was to acquire certain rubber and tobacco estates in a particular district, and, apart from the general words at the end of sub-clause 30, the succeeding sub-clauses, including sub-clauses 8 and 12, must be read as ancillary to the main objects; they merely state powers as means to an end, and those powers cannot be treated, consistently with the canon of construction laid down by the Courts, as objects. Upon the principle above stated general words which give a nonsensical effect to a business document should be disregarded, and the declaration at the end of clause 30 fails to effect its object of evading the statute. Sub-clause 12 cannot be treated as an object to which that declaration applies. The transaction in question was therefore ultra vires.

Hon. Frank Russell, K.C., and *A. F. Topham*, for the respondent. 1. As regards the construction of the memorandum of association, the power to apply for and hold shares in other companies was, as

(1) (1882) 20 Ch. D. 169, 188.
(2) (1897) 76 L. T. 269, 271.
(3) [1910] A. C. 87, 94.
(4) [1902] 1 Ch. 745.

therein expressly stated, not subsidiary or ancillary but a separate and independent object of the company. 2. Even if a memorandum of association expressed in unlimited terms would otherwise be invalid, the certificate of incorporation of the company by virtue of s. 17 of the Companies (Consolidation) Act, 1908, is conclusive of its validity.

Whinney replied.

The House took time for consideration.

May 6. LORD FINLAY L.C. My Lords, the Essequibo Rubber and Tobacco Estates, Limited, is a company which was registered on April 6, 1910. The memorandum of association is one of a type which unfortunately has become common. The Companies (Consolidation) Act, 1908, requires that the memorandum of association should set out, inter alia, "the objects of the company" (s. 3). The memorandum of this company in clause 3 set out a vast variety of objects, and wound up with the following extraordinary provision: "The objects set forth in any sub-clause of this clause shall not, except when the context expressly so requires, be in any wise limited or restricted by reference to or inference from the terms of any other sub-clause, or by the name of the company. None of such sub-clauses or the objects therein specified or the powers thereby conferred shall be deemed subsidiary or auxiliary merely to the objects mentioned in the first sub-clause of this clause, but the company shall have full power to exercise all or any of the powers conferred by any part of this clause in any part of the world, and notwithstanding that the business, undertaking, property or acts proposed to be transacted, acquired, dealt with or performed do not fall within the objects of the first sub-clause of this clause."

Warrington L.J. expressed some doubt in his judgment in this case whether a memorandum setting out such a profusion of objects was a compliance with the Act, and it is possible that in some future case the question may arise on application for a mandamus if the registrar should refuse registration, taking the ground that the Act requires that the memorandum should be in such a form that the real objects of the company are made intelligible to the public.

In the present case no such question arises. The registrar

H. L. (E.) 1918

COTMAN v. BROUGHAM.

Lord Finlay L.C.

accepted the memorandum of association and gave a certificate of incorporation, and that certificate is conclusive. The 17th section of the Act enacts that "A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act." All that the Courts can do is to construe the memorandum as it stands.

In the present case the question is whether it was intra vires of the Essequibo Rubber Company to enter into the transaction which has ended in the company's being put upon the B list of contributories to another company, the Anglo-Cuban Oil, Bitumen, and Asphalt Company, Limited. The Essequibo Company underwrote shares in the Anglo-Cuban Company and received an allotment of 17,200 such shares. An order was made for a compulsory liquidation of the Anglo-Cuban Company, and it was ordered that the Essequibo Company, which is already in liquidation, should be placed on the B list of contributories in respect of 14,046*l.* due upon these shares. An application was made to strike out the name of the Essequibo Company from the list of contributories on the ground that the whole transaction was ultra vires. Neville J. refused the application, and he was affirmed by the Court of Appeal.

The question depends upon the interpretation to be put upon the 3rd clause of the memorandum of association. This clause has 30 heads dealing with a multitude of objects and of powers. It is only necessary to refer to the 8th and 12th heads of that clause, in addition to the general provision at the end of the clause which I have already quoted: "(8.) To promote, form, issue and be interested in any company or companies, either in Great Britain, British Guiana or elsewhere, and take, acquire, hold, transfer, sell, surrender or otherwise dispose of and deal in shares, stocks, bonds, obligations, debentures, debenture stock, scrip or securities in or of any such company, and to transfer to any such company any property of this company, and to subsidise or otherwise assist any such company; and in the event of any property sold to such company proving unsatisfactory, to make over to it, gratuitously or otherwise, any other property or rights, either in lieu of the property sold or

transferred or otherwise." "(12.) To buy or otherwise acquire in any way, and hold, sell or deal with or in any stocks, shares, securities or obligations of any Government, authority, corporation or company which may be considered capable of being profitably held or dealt in or with by the company."

I agree with both Courts below in thinking that it is impossible to say that the acquisition of these powers was ultra vires of the Essequibo Company.

It is well worthy of consideration whether, if it should appear that the law as it stands is not sufficient to cope with such abuses as are exemplified in the memorandum now in consideration, the Companies Act should not be amended so as to bring the practice into conformity with what must have been the intention of the framers of the Act. But the only question before us now is the construction of the memorandum as it stands, and in my opinion this appeal must be dismissed with costs.

LORD ATKINSON. My Lords, I concur.

LORD PARKER OF WADDINGTON. (1) My Lords, I agree.

It may well be that the memorandum of association in the present case is not framed on the lines contemplated by the Companies (Consolidation) Act, 1908. This point would no doubt have been open to argument on proceedings for a mandamus had the registrar refused to accept it. Possibly, also, it might have been raised in proceedings on behalf of the Crown to cancel the company's certificate of incorporation (see the case of *Bowman* v. *Secular Society* (2)). It cannot, however, be raised in these proceedings, because the 17th section of the Act makes the certificate of incorporation conclusive evidence that (inter alia) the provisions of s. 3 as to stating the objects of the company in its memorandum of association have been duly complied with. The only point, therefore, open to your Lordships' House is the true construction of such memorandum, and on this point I find myself in such complete agreement with the Lord Chancellor that I have little to add. Clause 3, sub-clauses 8 and 12, of the memorandum are in their terms amply wide enough to cover the transaction in question,

(1) Read by Lord Atkinson. (2) [1917] A. C. 406, 439.

H. L. (E.) 1918 COTMAN v. BROUGHAM. Lord Parker of Waddington.

and the concluding words of sub-clause 30 were clearly introduced to preclude the operation of these (among other) sub-clauses being cut down by considerations such as arose in *Stephens* v. *Mysore Reefs (Kangundy) Mining Co.* (1)

My Lords, Mr. Whinney in his able argument suggested that, in considering whether a particular transaction was or was not ultra vires a company, regard ought to be had to the question whether at the date of the transaction the company could have been wound up on the ground that its substratum had failed. Upon consideration I cannot accept this suggestion. The question whether or not a company can be wound up for failure of substratum is a question of equity between a company and its shareholders. The question whether or not a transaction is ultra vires is a question of law between the company and a third party. The truth is that the statement of a company's objects in its memorandum is intended to serve a double purpose. In the first place it gives protection to subscribers, who learn from it the purposes to which their money can be applied. In the second place it gives protection to persons who deal with the company, and who can infer from it the extent of the company's powers. The narrower the objects expressed in the memorandum the less is the subscribers' risk, but the wider such objects the greater is the security of those who transact business with the company. Moreover, experience soon showed that persons who transact business with companies do not like having to depend on inference when the validity of a proposed transaction is in question. Even a power to borrow money could not always be safely inferred, much less such a power as that of underwriting shares in another company. Thus arose the practice of specifying powers as objects, a practice rendered possible by the fact that there is no statutory limit on the number of objects which may be specified. But even thus, a person proposing to deal with a company could not be absolutely safe, for powers specified as objects might be read as ancillary to and exercisable only for the purpose of attaining what might be held to be the company's main or paramount object, and on this construction no one could be quite certain whether the Court would not hold any proposed transaction to be ultra vires. At any rate, all the surrounding circumstances would

(1) [1902] 1 Ch. 745.

require investigation. Fresh clauses were framed to meet this difficulty, and the result is the modern memorandum of association with its multifarious list of objects and powers specified as objects and its clauses designed to prevent any specified object being read as ancillary to some other object. For the purpose of determining whether a company's substratum be gone, it may be necessary to distinguish between power and object and to determine what is the main or paramount object of the company, but I do not think this is necessary where a transaction is impeached as ultra vires. A person who deals with a company is entitled to assume that a company can do everything which it is expressly authorized to do by its memorandum of association, and need not investigate the equities between the company and its shareholders.

The only other point which I need mention is the company's name. In construing a memorandum of association the name of the company, being part of the memorandum, can, of course, be considered. But where the operative part of the memorandum is clear and unambiguous, I do not think its obvious meaning ought to be cut down or enlarged by reference to the name of the company. It should be remembered that the name is susceptible of alteration, and it would be impossible to hold that such alteration could diminish or enlarge a company's powers. On the other hand, the name may be very material if it be necessary to consider what is the company's main or paramount object in order to see whether its substratum is gone.

I think the appeal should be dismissed with costs.

LORD WRENBURY. My Lords, on April 6, 1910, the Essequibo Rubber and Tobacco Estates, Limited, were incorporated by registration under the Companies Act, 1908. To obtain the advantage of that incorporation the law required that "The memorandum must state . . . . the objects of the company" (s. 3, sub-s. 1 (iii.)). There is some guidance furnished by the Act as to the meaning of these words. There are other matters which the Act requires to be stated in the memorandum. Sects. 7 and 45 speak of all collectively as "conditions contained" in the memorandum of association; s. 41 as "conditions of its memorandum." Sect. 9 speaks of the "provisions of its memorandum" with respect to the objects. Sect. 9 shows that the Act contemplates that the company will as a

H. L. (E.) 1918 COTMAN v. BROUGHAM. Lord Wrenbury.

consequence of "the provisions of its memorandum" have what the Act calls "its business" and will have a "main purpose." Sect. 9 (*e*) speaks of the "objects specified in the memorandum." The meaning of the Act in this respect is not without authority, which at any rate is some guidance. One ground for winding up is that the Court is of opinion that it is just and equitable that the company should be wound up (s. 129 (vi.)). *In re German Date Coffee Co.* (1) is the leading authority for the proposition that when that which is called the substratum of the company is gone a winding up order may be made under s. 129 (vi.). The substratum is gone when the "main purpose" has become impossible. This class of cases recognizes the existence of a "main purpose" in a memorandum which names a host of acts in the clause which has to state the objects.

My Lords, I cannot doubt that when the Act says that the memorandum must "state the objects" the meaning is that it must specify the objects, that it must delimit and identify the objects in such plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activities are to be confined.

The purpose, I apprehend, is twofold. The first is that the intending corporator who contemplates the investment of his capital shall know within what field it is to be put at risk. The second is that any one who shall deal with the company shall know without reasonable doubt whether the contractual relation into which he contemplates entering with the company is one relating to a matter within its corporate objects.

The objects of the company and the powers of the company to be exercised in effecting the objects are different things. Powers are not required to be, and ought not to be, specified in the memorandum. The Act intended that the company, if it be a trading company, should by its memorandum define the trade, not that it should specify the various acts which it should be within the power of the company to do in carrying on the trade. The Third Schedule of the Act contains model forms of memoranda of association. These ought to be followed. Sect. 118, sub-s. 1, enacts that those forms "or forms as near thereto as circumstances admit" shall be used in all matters to which those forms refer.

(1) 20 Ch. D. 169.

There has grown up a pernicious practice of registering memoranda of association which, under the clause relating to objects, contain paragraph after paragraph not specifying or delimiting the proposed trade or purpose, but confusing power with purpose and indicating every class of act which the corporation is to have power to do. The practice is not one of recent growth. It was in active operation when I was a junior at the Bar. After a vain struggle I had to yield to it, contrary to my own convictions. It has arrived now at a point at which the fact is that the function of the memorandum is taken to be, not to specify, not to disclose, but to bury beneath a mass of words the real object or objects of the company with the intent that every conceivable form of activity shall be found included somewhere within its terms. The present is the very worst case of the kind that I have seen. Such a memorandum is not, I think, a compliance with the Act. The Act throws upon the registrar a great responsibility when it provides, as it does, that his certificate of incorporation "shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with." Before registering a memorandum of association the registrar ought to consider whether the requirements of the Act have been complied with and to refuse registration if he conceives that they have not, bearing in mind that if he does not take that course he may put the Court in the position in which your Lordships find yourselves in the present case—a position in which you must assume that all requirements in respect of matters precedent and incidental to registration have been complied with and confine yourselves to the construction of the document. I shall take care that the Committee which is now sitting to inquire as to amendments desirable in the law relating to joint stock companies looks into this question and considers whether amendment is desirable both to strengthen the requirements as to definition of objects and to control in some proper way the finality of the registrar's certificate.

My Lords, I turn to consider the transaction in question in this case, and to see whether it falls within the company's objects upon a true construction of the memorandum of association, assuming, as I am bound to do, that that is a valid instrument.

The transaction was as follows: A company called the Anglo-

H. L. (E.) 1918 COTMAN v. BROUGHAM. Lord Wrenbury.

Cuban Oil, Bitumen, and Asphalt Company, Limited, was in November, 1910, being promoted by a company called the London and Mexican Exploitation Company, Limited. The Essequibo Company in November, 1910, sub-underwrote 20,000 shares of 10*s.* each in the Anglo-Cuban Company for a commission of 600*l.* in cash and 5,000*l.* in cash or shares upon one Chansay, who was the promoter, undertaking to purchase at par on or before November 30, 1911, any shares which the Essequibo Company might have to take up. The Essequibo Company had to take up 17,200 shares. On November 29, 1910, they applied for that number and they were allotted to them. On September 6, 1912, they transferred the shares to the London and Mexican Company. On November 12, 1912, an order was made to wind up the Anglo-Cuban Company. The Essequibo Company have been put upon the B list of contributories. They, by their liquidator (for they also are in liquidation), applied to vary the B list by excluding their name therefrom. The ground of that application was that the transaction was ultra vires the Essequibo Company. The only question open on this appeal is whether upon the construction of the memorandum of association the transaction was ultra vires.

The construction of the instrument does not admit of reasonable doubt. Clause 3, sub-clauses 8 and 12, are in terms so wide that an obligation in a contingent event to take up shares falls within them. The language of clause 3, sub-clause 30, is such that I cannot say that such a transaction was ultra vires, because it was not ancillary to or connected with or in furtherance of something which I find elsewhere in the company's memorandum to have been "its business." Upon the narrow question, upon which alone it is unfortunately within the competence of this House to determine, I think the decision below was right. It follows that this appeal must be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 6, 1918.

Solicitors for appellant: *Sparks, Whitehouse, Russell & Co.*
Solicitors for respondent: *Stanley Evans & Co.*

[HOUSE OF LORDS.]

ROYAL AGRICULTURAL HALL COMPANY, LIMITED . . . . . } Appellants ;

AND

ASSESSMENT COMMITTEE OF THE METROPOLITAN BOROUGH OF ISLINGTON . . } Respondents.

H. L. (E.)*
1918
May 6.

Rating—Metropolis—Reduction in Rateable Value—Provisional List showing Value unaltered—Power of Assessment Committee to strike out Entry—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 47, *sub-ss.* 6, 7, 10.

Under s. 47 of the Valuation (Metropolis) Act, 1869, where a provisional valuation list is sent by the overseers to the assessment committee on the requisition of a ratepayer alleging that a hereditament for which he has been rated has for the causes therein set out been reduced in value, but the values stated in the provisional list are the same as those stated in the quinquennial list then in force, and, upon objection being made to these values, the assessment committee determine that there has been no alteration in the value of the hereditament, the committee have power to strike out the entry from the provisional list.

Decision of the Court of Appeal [1917] 2 K. B. 215 affirmed.

Appeal from an order of the Court of Appeal (1) reversing an order of the Divisional Court.

The appellants were the owners and occupiers of the Royal Agricultural Hall in the parish of Islington. The respondents were the assessment committee for the area comprising the metropolitan borough and parish of Islington.

In the quinquennial valuation list made in 1915 for the parish of Islington, as finally approved by the respondents, the said hereditament was valued at 8500*l.* gross value and 5500*l.* rateable value. On April 4, 1916, the appellants made a written requisition to the overseers of the borough of Islington under s. 47 of the Valuation

* *Present :* Lord Finlay L.C., Viscount Haldane, Lord Shaw of Dunfermline, and Lord Parmoor.

(1) [1917] 2 K. B. 215.

H. L. (E.) 1918

ROYAL AGRICULTURAL HALL COMPANY v. ISLINGTON ASSESSMENT COMMITTEE.

(Metropolis) Act, 1869 (1), requiring them to send a provisional valuation list to the respondents containing the gross and rateable values of the said hereditament as reduced in value since the commencement of the year commencing on April 6, 1915, owing to restrictions put upon the use of the building by the Minister of Munitions.

On May 3, 1916, the overseers duly made a provisional valuation list, in which the same values were entered in respect of the said hereditament as those stated in the quinquennial valuation list.

On May 16, 1916, the appellants gave notice of objection to the provisional valuation list on the ground that the assessment was excessive and unfair, and, after hearing the objection, the respondents determined that there had been no alteration in the value of the hereditament within the meaning of s. 47 and ordered the entry relating thereto to be struck out of the provisional valuation list. The appellants complained that the respondents had no jurisdiction to strike out the entry and that by reason of the entry being struck

(1) Valuation (Metropolis) Act, 1869, s. 47: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect":—

[Sub-ss. 1 to 3 provided for the sending to the assessment committee, on the written requisition of the committee or of any ratepayer or of the surveyor of taxes, of a provisional valuation list, and sub-ss. 4 and 5 provided machinery for the making of objections to such list by the occupier or the surveyor of taxes.]

Sub-s. 6: "The committee shall hear and determine on the objection in the same manner as if it were an objection to a valuation list, and may make such order as they think just."

Sub-s. 7: "If no objection is made, then on the expiration of the time for making objections, or if an objection is made then as soon as the assessment committee have determined on the objection, the assessment committee shall cause a copy to be made of the provisional list, with any alteration made in it by the committee, and shall return the list and the copy thereof, after being dated and signed by their clerk, to the overseers:"

By sub-s. 10 . . . . "if when the next revision of the valuation list takes place the list as approved and altered on appeal contains a smaller value for the hereditament comprised in a provisional list than the value stated in such provisional list, the amount of rate or tax which has been overpaid in consequence of the larger value having been stated shall be repaid or allowed:"

out the appellants had been deprived of the benefit conferred by sub-s. 10 of s. 47 of the Act; and they accordingly obtained a rule nisi in the King's Bench Division calling upon the respondents to show cause why a writ of mandamus should not issue commanding them to deal according to law with the provisional list.

On cause being shown, the Divisional Court (Viscount Reading C.J. and Lord Coleridge J., Ridley J. dissenting) ordered a writ of mandamus to issue commanding the respondents to restore to the provisional valuation the entry which they had struck out.

The Court of Appeal (Lord Cozens-Hardy M.R., Warrington L.J., and Scrutton L.J.) were of opinion that as a matter of law the respondents had power to strike the entry out of the provisional list if they were satisfied that there was no alteration in the value of the hereditament during the year, and they discharged the order of the Divisional Court.

In the year 1916 a supplemental valuation list was made for the parish of Islington and the Royal Agricultural Hall was not inserted therein. The appellants, after giving notice of objection to the respondents, appealed to the quarter sessions against the omission of the hereditament from the supplemental valuation list, and, after the argument of the appeal to the Court of Appeal in the present case, the quarter sessions made an order by consent, whereby the Royal Agricultural Hall was directed to be entered in the supplemental valuation list (which came into force on April 6, 1917) at a gross value of 5900*l.* and a rateable value of 3815*l.*

1918. April 11, 12. *Ryde, K.C.* (with him *Tyrrell T. Paine*), for the appellants. The assessment committee have no jurisdiction under the Valuation (Metropolis) Act, 1869, to strike out an entry in the provisional list on a question of amount. The provisional list and the quinquennial and supplemental lists stand on a different footing and the machinery regulating these lists is different. The quinquennial list lasts until the next quinquennial list unless it is itself replaced by a supplemental list, which may be made in any of the intervening years. A provisional list may be made at any time at the instance of either the ratepayer or the surveyor of taxes, and lasts until the list next thereafter made (whether supplemental

H. L. (E.) 1918

ROYAL AGRICULTURAL HALL COMPANY v. ISLINGTON ASSESSMENT COMMITTEE.

or other) comes into force. This House has held that a request for a provisional list must be granted if it is made bona fide and is not frivolous, though such provisional list need not show any increase or reduction in value: *London County Council* v. *Islington Assessment Committee.* (1) For the moment the appellants are not objecting to being rated in the provisional list at the old figure, but they object to being struck out of the list altogether. Taking s. 47 by itself, the assessment committee have no power to strike out, but, when read with the other sections of the Act, the inference of no power is irresistible. As regards the quinquennial list, the committee have an unfettered power of correction and alteration, either with or without objection being made, and they are expressly directed to revise the list whether any alteration is made or not: see ss. 6, 7 (which incorporates ss. 18-21 of the Union Assessment Committee Act, 1862), 9, 11, 14, 43, 45. The Act also provides an ample power of appeal to quarter sessions against the quinquennial list on all grounds (ss. 23-32), in addition to a right of appeal to special sessions in certain cases (ss. 18-22). Sect. 46 provides for the revision of the quinquennial list by supplemental lists, which are subject to the same regulations as the quinquennial list. Contrast s. 47, which relates only to provisional lists, with these provisions. The provisions in s. 47 relating to alterations in the list are strictly limited, and there is no power to appeal to quarter sessions. In particular s. 20 of the Union Assessment Committee Act, 1862, which confers on the committee the widest power of making alterations, whether with or without an objection being made, is not incorporated in this section. Upon the true construction of s. 47 the committee have no power to make any alteration in the list except upon objection made. The relevant provisions are sub-ss. 6 and 7. Sub-s. 6 deals exclusively with the hearing and determining of objections, and the concluding words "may make such order as they think fit" refer only to an order made upon the objection. Sub-s. 7 deals with both cases, namely, where an objection is made and where no objection is made, but the words "with any alteration made in it by the committee" do not by implication confer upon the committee a general power to alter the provisional list, but refer to the case where an objection has been made. In *London*

(1) [1915] A. C. 762.

County Council v. *Islington Assessment Committee* (1) the House did not purport to decide what was to be the ultimate fate of the provisional list there in question. The complaint of the appellants is that by being struck off the list they are deprived of the chance of obtaining a rebate under sub-s. 10 if, on the next revision of the valuation list, the list shows a smaller value for the hereditament than the value stated in the provisional list. [Counsel also contended that the respondents were estopped from striking the appellants off the provisional list by a letter written shortly after the quinquennial list was made, providing for the reopening of the matter. This letter is set out in the report of the case before the Court of Appeal.]

G. J. Talbot, K.C., and *Sydney G. Turner*, for the respondents, were not called upon.

The House took time for consideration.

May 6. LORD FINLAY L.C. My Lords, this case turns upon the powers and duties of the assessment committee under s. 47 of the Valuation (Metropolis) Act, 1869, with regard to a provisional valuation of the appellants' hall.

On April 4, 1916, the appellants sent in a requisition calling upon the overseers of the borough of Islington to send to the assessment committee a provisional valuation showing the reduced rateable value of the Royal Agricultural Hall since April 6, 1915, consequent upon restrictions imposed upon its use by the Minister of Munitions. A provisional valuation list was made on May 3, 1916, in which the Royal Agricultural Hall was inserted at a gross value of 8500*l.* and a rateable value of 5500*l.*, being the same values at which the hall stood in the quinquennial list made in 1915. On May 16, 1916, the appellants sent in notice of objection to the said provisional list on the ground that the amounts were excessive, and requiring that they should be reduced to 5161*l.* gross and 2130*l.* rateable. This objection was heard before the assessment committee, who, by letter dated September 26, 1916, communicated to the appellants their determination that there had been no alteration in the value of the hall within the meaning of s. 47 and their decision that the

(1) [1915] A. C. 762.

H. L. (E.) 1918

ROYAL AGRICULTURAL HALL COMPANY v. ISLINGTON ASSESSMENT COMMITTEE.

Lord Finlay L.C.

entry in the provisional list relating to the hall should be struck out.

The appellants thereupon obtained in the King's Bench Division a rule nisi for a mandamus to the assessment committee to deal according to law with the provisional valuation list on the ground that they had acted unlawfully in striking out the entry relating to the hall, and that the hereditament was reduced in value in the year 1916 within the meaning of the Act. Cause was shown against this rule and against a similar rule in the case of the *Westminster Assessment Committee* on January 28, 1917, the two cases being heard together. The King's Bench Division (Lord Reading C.J. and Lord Coleridge J., Ridley J. dissenting) made absolute the rule against the present appellants and required them to restore to the list the entry relating to the appellants' hall. On appeal this judgment was reversed by the Court of Appeal (Lord Cozens-Hardy M.R., Warrington L.J., and Scrutton L.J.), who held that the assessment committee had power to strike out the entry if they were satisfied that there was no alteration in the value during the year.

In the supplemental valuation list which came into force on April 6, 1917, the appellants' hall was by order of the London Quarter Sessions, on appeal, entered at a gross value of 5900*l.* and a rateable value of 3815*l.*, and the appellants contended that if their hall had been retained on the provisional list they would under the concluding words of s. 47, sub-s. 10, have become entitled to a return of the amount of rate on the difference between the 5900*l.* and the 3815*l.* in the supplemental list, and the 8500*l.* and 5500*l.* in the provisional list. The present appeal has been brought to your Lordships' House to have the decision of the Court of Appeal reversed and the entries as to the Agricultural Hall restored in the provisional list.

The whole question in the case is whether the assessment committee had power to strike out the entry. The committee say they had, as there was no reduction in value as compared with the quinquennial list in force when the provisional one was made. The appellants insist that the committee were bound to leave the entry on the provisional list, though the amount was the same as in the quinquennial, as this would have given the appellants a right to a return of the rate on the amount by which the entry in the pro-

visional list exceeded the amount in the supplemental list which came into force on April 6, 1915.

In my opinion this appeal must fail. The point is really concluded by the decision of this House in *London County Council* v. *Islington Assessment Committee* (1), on appeal from the decision of the Court of Appeal reversing the decision of the Divisional Court. (2) In that case the London County Council sent in a requisition for a provisional list in respect of their tramway undertaking within the borough of Islington on the ground that it had been reduced in value under s. 47 of the Valuation (Metropolis) Act, 1869, owing to the competition of motor omnibuses. The assessment committee refused, on the ground that there was no prima facie evidence of a reduction in value within s. 47. The London County Council obtained a rule for a mandamus to the assessment committee for the making of a provisional list, and affidavits were filed on both sides. The Divisional Court made the rule absolute. This decision was reversed by the Court of Appeal, who held that no prima facie case of a reduction of a permanent nature had been made out, and that, for the purpose of ascertaining whether there had been an increase or reduction of value within s. 47, the comparison must be with the amount appearing in the quinquennial list or in that list as varied by a supplemental list. On appeal to your Lordships' House the decision on this latter point was affirmed, but it was also held that it was not necessary for the person making the requisition for a provisional list to show even a prima facie case of increase or reduction in value as a condition precedent to the duty of the overseers to prepare a provisional list, or, in their default, of the assessment committee to appoint a person to make it, but that the duty was purely ministerial and must be discharged unless the requisition was made in bad faith or was frivolous. It was further held that the provisional list to be made by the overseers or person appointed by the assessment committee on their default need not show any increase or reduction in value, if in the opinion of those making the list there was none in fact.

The result of this decision is that the only effect of the making of a provisional list by the overseers or by the person appointed by the assessment committee is to put the matter in train for decision

(1) [1915] A. C. 762. (2) [1914] 3 K. B. 481.

H. L. (E.) 1918

ROYAL AGRICULTURAL HALL COMPANY v. ISLINGTON ASSESSMENT COMMITTEE.

Lord Finlay L.C.

by the assessment committee when it comes before them under sub-ss. 6 and 7 of s. 47 for decision on the merits. It was pointed out that when it so came before them it would be the duty of the assessment committee to decide whether and to what extent the quinquennial list was to be modified. This is stated in terms by Lord Parker and by Lord Sumner, and it is obviously the foundation on which the decision of the House of Lords rests. It appears at first sight startling that there should be an obligation on the overseers to make a provisional list, even if it can show no increase or reduction in value. But this first step was regarded by the House of Lords in the *London County Council Case* (1) as merely formal, and as having no other effect than to bring the whole question up for decision by the assessment committee.

Mr. Ryde, for the appellants in the present case, argued that the assessment committee had power under sub-ss. 6 and 7 of s. 47 only to decide on objections made, and that they could make no alterations in the provisional list except on objections. Such a construction of these sub-sections would bring about a fantastic result. It would confer a right on any ratepayer to obtain from the overseers a provisional list, however unfounded the request for it might be, provided only it was made in good faith and not obviously frivolous. There must be a power in the assessment committee to say whether the provisional list ought to have been made at all, and this depends on the question whether there has, in fact, been an increase or reduction in value. To construe sub-ss. 6 and 7 in the restricted sense suggested is entirely inconsistent with the decision of the House of Lords, which can have been arrived at only on the footing that the assessment committee would have full power to do justice in the matter. The wording of sub-s. 7 is in conformity with this view. The initial words fix the time at which the committee are to discharge the duty imposed by the later words of the sub-section; it is to be discharged on the expiration of the time for making objections, or as soon as the committee have determined on any objections made. The committee are then to make a copy of the provisional list showing any alterations they have made in it, and to return the list, together with the copy, to the overseers. The power to make alterations is general. It would indeed be a

(1) [1915] A. C. 762.

reductio ad absurdum of the decision in the *London County Council Case* (1) if your Lordships were to give effect to Mr. Ryde's argument that the committee were bound to let the provisional list stand, though there was in fact no increase or reduction, and though the provisional list showed no alteration in the figures. It was strongly urged that the list would have no practical effect unless in the event of the next revision showing a smaller value of the hereditament than that stated in the provisional list, in which case the ratepayer would be entitled to a return of the amount of the rate on the difference. But such a contingent right can be acquired only if there has been in fact an increase or reduction in value, as it is only in that case that a provisional list is to be finally made. The appellants' view would strike out the initial words of s. 47 altogether, whereas it was decided by this House in the *London County Council Case* (1) that the increase or reduction in value is a condition precedent to the ultimate modification of the quinquennial by the provisional, though not to the preparation of the provisional in the first instance by the overseers or person to be appointed by the committee.

I am of opinion that this appeal must be dismissed with costs.

VISCOUNT HALDANE. My Lords, this appeal raises a question of the construction of s. 47 of the Valuation (Metropolis) Act, 1869. The appellants occupy the hereditament known as the Royal Agricultural Hall at Islington, and they have claimed a mandamus directing the respondents to restore in the provisional valuation list of the borough of Islington an entry relating to the hall which was struck out in pursuance of a decision of the latter given on September 26, 1916, on an objection to the list. The appellants had called on the overseers of the borough to send to the respondents a provisional valuation list, within the meaning of s. 47, showing the gross and rateable values of the hall as alleged to be altered in consequence of restrictions on its use made by the Government. This was done, but the entry in the list as made out contained in the result the same values as had previously appeared in the quinquennial valuation list made in 1915. The appellants then gave notice of objection, and appeared in support of it before the respondents. The latter gave a decision on the objection,

(1) [1915] A. C. 762.

H. L. (E.) 1918

ROYAL AGRICULTURAL HALL COMPANY v. ISLINGTON ASSESSMENT COMMITTEE.

Viscount Haldane.

refusing to alter the amounts appearing in the existing quinquennial valuation list. They also ordered the entry in the new provisional valuation list to be struck out, and intimated this to the appellants by letter dated September 26, 1916. Against the valuation in the provisional list the Act gave the appellants no power to appeal. But they claimed to be entitled to retain the entry at first made, no doubt in order to have the advantage conferred by the concluding words of sub-s. 10 of s. 47, which would have enabled them on the next revision of the valuation list, if such revised list as approved and altered on appeal had contained a smaller value for the hereditament comprised in the provisional list than the value stated in that list, to claim retrospectively repayment of the difference.

A majority of a Divisional Court of the King's Bench Division decided that the appellants were entitled to have the entry restored, and granted a mandamus to that effect. But the Court of Appeal reversed the judgment, holding that the respondents had power to strike out the entry if they were satisfied that there was no alteration in the value of the hereditament. The question before the House is whether that decision was right.

My Lords, the answer to this question appears to me to depend exclusively on the language which has been adopted by the Legislature in the enactment of s. 47. That section alone provides the statutory code under which a right can be set up to a provisional list showing the change which has taken place during the year from any cause in the value of a hereditament. The overseers of the parish are, on the requisition, inter alios, of any ratepayer, to send in to the assessment committee a provisional list showing what the former consider to be changes in value. The assessment committee, who, on any default by the overseers, are themselves to appoint a person to make out the list, are to notify, when made out, to the occupier of a hereditament any entry which relates to it. The occupier or the surveyor of taxes may give notice of objection to what is so entered in the list, and then the assessment committee are by sub-s. 6 to " hear and determine on the objection in the same manner as if it were an objection to a valuation list, and to make such order as they think just." By sub-s. 7, if no objection is made, or if the objection is made then as soon as the committee have determined on the objection, a copy of the list is to be made and signed as altered,

if it is altered, and is to be operative until the next list (supplemental or otherwise) comes into force, and is to form part of the valuation list for the time being for the purposes of rates and taxes. But all of these provisions are to have effect, as stated by the initial words of s. 47, only if in the course of the year the value of the hereditament "is increased by the addition thereto or the erection thereon of any building, or is from any cause increased or reduced in value."

My Lords, in *London County Council* v. *Islington Assessment Committee* (1) this House decided that the increase or reduction of value referred to in the words there used was not required to be established as a condition precedent to the right of a ratepayer to make a requisition for the preparation of a provisional list under the section, if claimed in good faith; and that the sole question on an application for a mandamus to enforce the duty in this respect of the assessment committee was the bona fides of the requisitioner, and that their duty was at this stage purely ministerial. I think that the decision, which is, of course, binding on us, meant that the initial words of the section must be construed as imposing no more than what is in effect a condition subsequent, importing that, if the result of the consequential inquiry by the committee was to show that there was no alteration in value, the ratepayer could derive no advantage from the procedure under the code enacted by the sub-sections. I see no difficulty in giving effect to this view. If it is carried to its logical consequences it enables the committee to refuse to have in the list any entry relating to a hereditament which they decide not to have changed in value. And one reason which makes this interpretation of the code a natural one is that it debars a ratepayer who has made an unfounded claim for reduction from not the less on that account setting up a right to a repayment under the concluding words of sub-s. 10, to which I have already referred, if on the next normal revision of the valuation list he has obtained a reduction in the valuation.

My Lords, if this be the true view of s. 47 read as a whole, then the words of sub-s. 6 conferring power on the assessment committee to "make such order as they think just," after disposing of the ratepayer's objection, enable them to strike what is a nugatory entry out of the provisional list altogether.

(1) [1915] A. C. 762.

H. L. (E.) 1918

ROYAL AGRICULTURAL HALL COMPANY v. ISLINGTON ASSESSMENT COMMITTEE.

I think that what I have just stated is the true interpretation of the words of the Act, and that the appeal therefore fails; for there is nothing in the other point raised as to estoppel.

LORD SHAW OF DUNFERMLINE. My Lords, the question in the case is well and compendiously stated by Warrington L.J. in these words: "The appellants are aggrieved by the omission of their house from the provisional list, even if it be entered therein as of the value of 327*l.*, because they lose the benefit of the rebate which they contend they would be entitled to under s. 47, sub-s. 10, and they accordingly sought by their application to the Court to have their house restored to the list."

My Lords, it does not appear to me that the judgment of this House in the *Islington Case* (1) has any actual bearing upon that question. It decided, in a word, that s. 47 of the statute, applying as it did to any alteration of value produced in the course of the running year, and containing as it did in its earlier sub-sections the procedure for settling the fact whether an alteration had occurred, could not mean that that fact had ab ante to be settled before the section was set agoing. This would have been of the nature of a statutory petitio principii.

In the present case the procedure has taken place, and properly taken place, under the section. It is ended. It is established definitively that no alteration of value should be made, and that accordingly, so far as the provisional list was concerned, the entire attempt to obtain a fresh and substituted valuation failed. This being so, there was made what, in my opinion, was a suitable and proper order, namely, that the entry should be struck out. But then, say the appellants, the list has, per the section, come into being: let the list with this entry—and it was conceded in argument that the question could be best tested by taking the provisional list as having the one entry and no other—therefore let the list with its one entry—no new figure—stand. This does no good as an alteration of valuation, but it lets in the operation of sub-s. 10; and if in a subsequent proceeding a supplemental list should contain a reduced figure, that reduction would be antedated so as to cover and upset the transaction of making no change in the provisional

(1) [1915] A. C. 762.

list, and would ex post facto make a change. This would not have happened if there had been no provisional list, but it does happen if there has been a provisional list although in fact that list did nothing in the way of alteration. This, in my opinion, is mere circumvention.

Fortunately, also, it is pretty plainly in contravention of the section itself. For sub-s. 10 is one of the cases to which the main and operative words of the section apply. What are those words? They are these: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect." Sub-s. 10—the whole of it—depends upon that, namely, that the value is increased or altered. Thereupon, says the sub-section, "A provisional list . . . . shall be deemed to form part of the valuation list . . . . and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament." This points to substitution, that is, to substitution of one figure for another, not to a repetition in one list of the same figure as is already in another. In short, when there is no substitution because no alteration, the whole basis of the application of the operative words of the section has gone; and it is right and proper that, there being neither substitution nor alteration, the entry in the provisional list be struck out.

This may have its consequences in defeating any attempt to treat a provisional list entry which effected nothing in the way of change as effective, and therefore bound to remain in the list, for some ulterior purpose. This, as I say, is in my view mere circumvention; and it is properly and well prevented by striking out from what was meant to be, in the shape of a provisional list, a record of change an entry which made no change. I entirely agree.

LORD PARMOOR. My Lords, this appeal raises the question whether the appellants are entitled to have their premises inserted in a provisional list under s. 47 of the Valuation (Metropolis) Act, 1869. On April 4, 1916, the appellants sent a requisition calling upon the overseers of the metropolitan borough of Islington to send a provisional valuation list to the assessment committee containing

H. L. (E.) 1918 — ROYAL AGRICULTURAL HALL COMPANY v. ISLINGTON ASSESSMENT COMMITTEE. — Lord Parmoor.

the gross and rateable values of the Royal Agricultural Hall as reduced in value since April 6, 1915, consequent upon certain Government requirements. On May 3 the Royal Agricultural Hall was inserted in a provisional valuation list prepared by the overseers at the gross value of 8500*l.* and a rateable value of 5500*l.*, being the same values as appeared in the last quinquennial valuation list. The appellants gave notice of objection, and after a hearing before the assessment committee the entry relating to the Royal Agricultural Hall was struck out of the proposed provisional list. The appellants thereupon applied for a mandamus to the Divisional Court, and an order was made directing the assessment committee to deal with the said provisional valuation list by restoring to the said list the entry relating to the Royal Agricultural Hall. This decision was reversed in the Court of Appeal.

The appeal depends on the construction of s. 47 of the Valuation (Metropolis) Act, 1869. The opening words in this section enact that the section shall apply "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value." In order, therefore, to make the section operative in reference to the Royal Agricultural Hall at the material date there must have been in the relevant year an increase or reduction in the value of that hereditament. It has been decided in this House in the case of *London County Council* v. *Islington Assessment Committee* (1) that the question of the reduction or increase in the value of a hereditament proposed to be placed in the provisional list is not for the determination of the overseers, or of any person appointed to make a provisional list in the case of the failure of the overseers to transmit a valuation list, and that the duties of the overseers or of the person so appointed are ministerial so long as the application made to them is bona fide in character.

In my opinion the same principle applies to sub-ss. 3, 4, and 5 as to sub-ss. 1 and 2, but in any case they are procedure subsections, and there is no question raised in reference to their application in the present appeal.

Sub-s. 6 is material. It enacts that the assessment committee shall hear and determine an objection brought before them as if

(1) [1915] A. C. 762.

it were an objection to a valuation list, and that they may make such order as they think just. I agree in the contention of Mr. Ryde that the powers of the assessment committee under the sub-section are limited to the determination of the particular objection, but it is not alleged that in this respect the assessment committee went outside the authority which the sub-section confers upon them. After considering the objection of the appellants on three separate occasions the committee decided against their contention and upheld the values which had been placed by the overseers in the provisional list. The effect of this decision was that in the opinion of the assessment committee there had been no change in the value of the Royal Agricultural Hall either by increase or reduction.

The crucial sub-section is sub-s. 7. This sub-section refers both to a case in which no objection has been made and to one in which an objection has been made. In the former case it is the duty of the assessment committee, on the expiration of time for making objections, to cause a copy to be made of the provisional list, with any alteration made in it by the committee, and to return the list and copy thereof, after being signed and dated by their clerk, to the overseers. In the latter case the same duty is placed upon the assessment committee so soon as they have determined on the objection raised before them. The effect is to place upon the assessment committee the duty of altering a provisional list if, after determining an objection when an objection has been made, they come to the conclusion that there has been neither increase nor reduction in value, during the material date, of a hereditament placed on the list forwarded to them, either by the overseers or the person appointed by them. This decision is final without appeal. It cannot be questioned in any Court unless it can be shown that an error has been made in a question of law. In the present case the assessment committee had determined, after hearing and consideration, that there had been no increase or reduction in the value of the Royal Agricultural Hall during the material time, and it was their duty to alter the provisional list and to exclude the hereditament in accordance with their determination.

I am unable to assent to the argument of Mr. Ryde that the assessment committee have not power to alter the provisional list where an objection has been made. It appears to me that this

H. L. (E.) 1918

ROYAL AGRICULTURAL HALL COMPANY v. ISLINGTON ASSESSMENT COMMITTEE.

Lord Parmoor.

power has been expressly conferred upon them, and that the structure of the whole section is consistent only with the construction that the assessment committee have been constituted the tribunal to determine in all cases whether an alteration should be made in the provisional lists submitted to them.

Whether an appeal should be allowed from the assessment committee on a matter of provisional valuation is a matter for the Legislature, and the absence of any provision for appeal cannot prevail to alter the duty which the section has conferred on that authority. I do not think that the subsequent sub-sections are material, although no doubt the appellants would have been entitled to claim a rebate under sub-s. 10, if they could have established their claim that the Royal Agricultural Hall should be inserted in a provisional list.

My Lords, both in the Divisional Court, and in the Court of Appeal, frequent reference was made to the case of *London County Council* v. *Islington Assessment Committee.* (1) In my opinion the judgments in that case do indicate that the assessment committee have full power in all cases to alter the provisional list, but it may be open to doubt whether, for the purposes of that case, it was necessary to give a final decision on the questions raised on this appeal.

My Lords, the appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 6, 1918.

Solicitors for appellants : *Kingsford, Dorman & Co.*
Solicitor for respondents : *A. M. Bramall.*

(1) [1915] A. C. 762.

[HOUSE OF LORDS.]

MURRAY . . . . . APPELLANT; H. L. (Sc.)*

AND 1918

COMMISSIONERS OF INLAND REVENUE . RESPONDENTS. *May* 6.

Revenue—Duties on Land Values—Excess Mineral Rights Duty—Method of Computation—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 43, *sub-ss.* 1 *and* 2—*Finance Act*, 1916 (6 & 7 *Geo.* 5, *c.* 24), *s.* 46, *sub-s.* 2.

Excess mineral rights duty is imposed by the Finance (No. 2) Act, 1915, s. 43, sub-s. 1, which provides that "where the amount payable to any person as rent in respect of the right to work minerals or of any mineral wayleaves (in cases where the right to work the minerals and the mineral wayleaves are not part of the assets of any trade or business) varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war . . . . exceeds the pre-war standard of that rent, there shall be paid . . . . by that person an amount equal to fifty per cent. of that excess."

By sub-s. 2, after providing that the pre-war standard of rent shall be taken to be the average of any two of the three last pre-war rent values to be selected by the taxpayer, "the pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year."

By the Finance Act, 1916, s. 46, sub-s. 2, it was declared that the words in sub-s. 1 of s. 43 of the Act of 1915 "assets of any trade or business" referred only to "assets of the trade or business of the person receiving the rent for the right to work the minerals or for the mineral wayleaves."

Upon an appeal by a proprietor of minerals in Scotland, which were leased to two colliery companies at rents or royalties varying with the prices of the minerals, against an assessment to excess mineral rights duty for the years 1914 and 1915 :—

Held—(1.) that the minerals were not exempted from duty by the words in brackets in sub-s. 1 of s. 43 of the Finance (No. 2) Act,

---

* *Present :* LORD FINLAY L.C., VISCOUNT HALDANE, LORD DUNEDIN, and LORD SHAW OF DUNFERMLINE.

H. L. (Sc.)
1918
MURRAY
v.
INLAND REVENUE COMMISSIONERS.

1915, as interpreted by sub-s. 2 of s. 46 of the Finance Act, 1916, which applied to the assessment in question, inasmuch as the "right to work the minerals" formed no part of the assets of the trade or business of the mineral owner; (2.) that the excess mineral rights duty was to be ascertained by applying the average prices governing the payment of rent for each of the selected years to the output of each of the accounting years and deducting the result from the rent, so far as variable according to the price, received for each of the accounting years, and then taking the statutory percentage of the difference.

Decision of the judges of the Court of Session named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts affirmed.

APPEAL from an interlocutor of the judges of the Court of Session named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts (Lord Johnson, Lord Salvesen, and Lord Cullen) upon a case stated by a referee acting under the Finance (1909-10) Act, 1910, and the Finance (No. 2) Act, 1915.

The appellant was the proprietor of minerals in the county of Stirling, which were leased by him to two colliery companies, the Alloa Coal Company, Limited, and Archibald Russell, Limited, at rents or royalties varying with the prices of the minerals when they exceeded a certain sum, and he was assessed by the respondents, the Commissioners of Inland Revenue, in the sums of 1324*l.* 11*s.* 9*d.* and 4540*l.* 14*s.* 6*d.*, making together 5865*l.* 6*s.* 3*d.* for the years 1914 and 1915 for excess mineral rights duty.

This duty was imposed by the Finance (No. 2) Act, 1915, s. 43, which provides: Sub-s. 1: "Where the amount payable to any person as rent in respect of the right to work minerals or of any mineral wayleaves (in cases where the right to work the minerals and the mineral wayleaves are not part of the assets of any trade or business) varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war (in this section referred to as the accounting year) exceeds the pre-war standard of that rent, there shall be paid as an addition to any mineral rights duty payable or paid, either directly or by deduction, by reference to the amount of the rent paid in that working year, by that person (in this section referred to as the person liable) an amount equal to fifty per cent. of that excess." Sub-s. 2: "The pre-war standard of rent shall,

for the purposes of this section, be taken to be the average of any two of the three last pre-war rent values, to be selected by the taxpayer. . . . . The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year."

By s. 46, sub-s. 2, of the Finance Act, 1916, it was declared that the words in sub-s. 1 of s. 43 of the Finance (No. 2) Act, 1915, "assets of any trade or business" referred only to "assets of the trade or business of the person receiving the rent for the right to work the minerals or for the mineral wayleaves."

This provision was enacted prior to the date of the assessments in question. The facts and the contentions of the parties as appearing from the stated case were, so far as material, substantially as follows:—

The accounting years were the years ended Martinmas, 1914, and Martinmas, 1915, and the years selected by the taxpayer under s. 43, sub-s. 2, were the years ended Martinmas, 1912, and Martinmas, 1913. The assessment for each of the accounting years was based upon pre-war rent values arrived at by taking the average prices governing the payment of the rent in the selected years (1912 and 1913) and applying those prices to the tonnage worked in each of the accounting years (1914 and 1915).

The rents payable for the first and second accounting years were 17,512*l.* 9*s.* 11*d.* and 21,849*l.* 7*s.* 2*d.*, and the average rents for the selected years amounted to 15,303*l.* 13*s.* 2*d.*

The average rates of royalties for the two selected years were, in respect of the mines let to the Alloa Coal Company, 9½*d.* per ton for coal and 1*s.* 4·3016*d.* per ton for coke and, in respect of the mines let to Archibald Russell, Limited, 7¾*d.* for main coal and 6½*d.* for other coals.

It was contended on behalf of the appellant, first, that the whole assessment was excluded by the words in brackets of sub-s. 1 of s. 43, which exempted from excess mineral rights duty any minerals the right to work which was part of the assets of any trade or business. The appellant contended that the minerals in question fell within this exemption in respect (*a*) that the right to work these minerals

H. L. (Sc.) 1918

MURRAY v. INLAND REVENUE COMMISSIONERS.

under the leases granted by the appellant formed part of the assets of the trade or business of the mineral tenants working the same; and (*b*) that the appellant was only the person who received rent for the right to work the minerals, which right was accordingly not vested in him but in his mineral tenants; and he further contended that the exemption of the minerals from liability under the exempting words in sub-s. 1 of s. 43 of the Act of 1915 had not been modified or prejudiced by the passing of the Finance Act, 1916, the effect of which was not retrospective.

Subject to this contention, the appellant admitted liability for payment of excess mineral rights duty for the accounting years in question to the extent of 4065*l.* 7*s.* 7*d.*—a sum based upon the difference of the mineral rents actually received by him in the accounting years and the average amounts of the rents received by him in the two selected pre-war years; whereas the Commissioners proposed to assess him in the sum of 5865*l.* 6*s.* 3*d.*, thus showing an over-assessment upon the appellant to the extent of 1799*l.* 18*s.* 8*d.*

The appellant contended that the language of sub-s. 1 of s. 43 necessarily referred to actual sums received, and not to hypothetical sums, and, further, that the excess mineral rights duty, being declared to be payable "as an addition to any mineral rights duty payable or paid," fell to be paid on the same basis as the mineral rights duty; that, such mineral rights duty being payable, in terms of the Finance Acts, in respect of actual royalties received by the person letting the minerals, it followed that the excess mineral rights duty must be ascertained in the same way. Applying that principle, the appellant contended that the "pre-war standard of rent" and "pre-war rent value" specified in the Act of 1915 fell to be determined by the average of the sums actually received as rent by the landlord in the two selected pre-war years.

Finally, the appellant contended under this head: (*a*) That no interpretation of a revenue statute could be accepted which had the effect of subjecting any proprietor of minerals who had let the same on lease to a liability to account to the Commissioners for excess mineral rights duty in respect of moneys which he had not in point of fact received during the accounting years in question. The difference of 1799*l.* 18*s.* 8*d.* shown above as arising between the excess mineral rights duty calculated on the basis of royalties actually

received by the appellant and the hypothetical basis adopted by the Commissioners was explained by the fact that owing to the war and the shortage of labour thereby occasioned the appellant's output had been so heavily reduced that this reduction had counteracted, in whole or in part, the increased price received by the appellant on this reduced output, so that to apply the pre-war rate of royalties to the actual output of the accounting years and to base the assessment to excess mineral rights duty upon the hypothetical results deduced therefrom was inequitable and unjust to the appellant.

(*b*) That the clause in sub-s. 2 of s. 43 dealing with pre-war rent value must be read in conjunction with the words of sub-s. 1 and the preceding part of sub-s. 2, and that, taking the whole of the clause together, it pointed to "rent" actually received by the mineral owner as the standard of comparison. In support of this view the appellant contended that the last words of the concluding paragraph of sub-s. 2 "in that year" were referable to the immediate antecedent "the accounting year" and could not be referred to the words "each of the three years immediately preceding the first accounting year" without unduly straining the language of the Legislature, and that read according to its natural meaning the paragraph was incapable of reasonable construction and ought to be disregarded. There was no authority in the words of the Act for the view that the interpretation to be given to it might, by the adoption of a purely hypothetical basis of calculation, bring out a greater excess than the rent or royalties actually received. On the contrary, the whole provisions of Part III. of the Act, which dealt with excess profits duty, and included excess mineral rights duty under this classification, contemplated an assessment to duty in respect of actual and not of hypothetical excess profits.

On behalf of the Commissioners it was contended, first, that the assessments were not excluded by the terms of sub-s. 1 of s. 43 of the Act of 1915, as interpreted by sub-s. 2 of s. 46 of the Finance Act, 1916, which was retrospective, inasmuch as the right to work the minerals formed no part of the assets of any trade or business carried on by the appellant; secondly, that the assessments proceeded upon a proper interpretation of the statute. The pre-war rent value was not the actual rent paid in each pre-war year, as contended for by

H. L. (Sc.) 1918 MURRAY v. INLAND REVENUE COMMISSIONERS.

the appellant, but the sum to which the rent for the accounting year would amount if it were based on the average prices obtained for the minerals in each of the three pre-war years. The object of the statute was thus not to tax any increase of rent payable in the accounting year as compared with the rent paid in the pre-war years, but to levy a tax upon such portion of the rent payable in the accounting year as was due to the increase, if any, in the price of coal as a result of the war. The only factor, therefore, to be looked at in the pre-war years was the price of the mineral, and the only way to reach the excess of rent contemplated by the statute was to apply to the output of mineral for the accounting year the prices governing the payment of rent in the pre-war years. The excess mineral rights duty did not fall to be assessed on the same basis as mineral rights duty, but was regulated by s. 43 of the Act of 1915.

The referee decided that the contention of the Commissioners of Inland Revenue was correct, and he accordingly awarded that the appellant was liable to the Commissioners for 5865*l.* 6*s.* 3*d.*, and this decision was affirmed by the judges of the Court of Session.

The arguments sufficiently appear from the above statement.

1918. May, 3, 6. *Robert L. Blackburn, K.C.*, and *J. S. Leadbetter* (both of the Scottish Bar), for the appellant, referred to *Attorney-General* v. *Marquis of Hertford* (1) and *Attorney-General* v. *Theobald* (2) on the question of the retrospective operation of s. 46, sub-s. 2, of the Finance Act, 1916.

The Solicitor-General for Scotland (*T. B. Morison, K.C.*) and *R. Candlish Henderson* (of the Scottish Bar), for the respondents.

Robert L. Blackburn, K.C., replied.

LORD FINLAY L.C. My Lords, the question in this case relates to the construction to be put upon s. 43 of the Finance (No. 2) Act, 1915, with reference to what is called in the marginal note "Excess mineral rights duty." Two points have been raised with which I shall deal for the purpose of dismissing them before I proceed to the consideration of the section generally. The first was as to the effect of the words which occur in the third, fourth, and fifth lines of s. 43, sub-s. 1, where it is stated that the enactment shall be "in

(1) (1849) 3 Ex. 670. (2) (1890) 24 Q. B. D. 557.

cases where the right to work the minerals and the mineral wayleaves are not part of the assets of any trade or business." It was suggested by the appellant that this was to exclude them from the operation of the Act; but reference was made by the appellant's counsel to the 46th section of the Act of 1916, which was passed for the purpose of amending that provision in this way: "It is hereby declared that the words in sub-section (1.) of section forty-three of the principal Act 'assets of any trade or business' refer only to assets of the trade or business of the person receiving the rent for the right to work the minerals or for the mineral wayleaves." My Lords, I think there was perhaps room still for further amendment in that provision in order to render it thoroughly intelligible and clear in its terms. The provision in the amending Act of 1916 certainly tends to show that the Legislature intended to make it clear that they meant what I must say for myself I should have read the provision as meaning, even if it had never been amended at all. I think it is perfectly plain that these words which I have read "in cases where the right to work the minerals and the mineral wayleaves are not part of the assets of any trade or business," inasmuch as the section is dealing with taxation on the rent, must refer to the case of the landlord's business and to what is called the right to work being part of the landlord's business. The words are unintelligible in any other view. Of course it must be said that "the right to work the minerals" is not a happy way at all of expressing the landlord's right to receive the rent in respect of the working of the minerals. It is a very slovenly method of expression, but still what was intended is, I think, plain even without the effect of the amending Act of 1916. I accordingly think that that point fails.

Then Mr. Blackburn also referred to the 7th sub-section of the 43rd section of the Act of 1915, which provides that "Expressions to which a special meaning is attached by Part I. of the Finance (1909-10) Act, 1910, shall have the same meaning in this section"; and he says that in the 1910 Act, s. 20, "rent value" was defined. I do not think that these words apply at all. What is defined there is the expression "rent value," and the definition given in that Act must be confined to the very words defined and occurring in the context to which the definition relates.

Clearing away these two subsidiary points, I proceed to the

H. L. (Sc.) 1918

MURRAY v. INLAND REVENUE COMMISSIONERS.

Lord Finlay L.C.

consideration of the enactment. I read s. 43, sub-s. 1, leaving out what for this purpose is immaterial: "Where the amount payable to any person as rent in respect of the right to work minerals or of any mineral wayleaves . . . . varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war . . . . exceeds the pre-war standard of that rent, there shall be paid . . . . an amount equal to fifty per cent. of that excess." That prescribes a plain and simple way of arriving at the amount on which the 50 per cent. is to be paid; and then when you go on to the 2nd sub-section, the pre-war standard of rent is to be taken to be the average of any two of the three last pre-war rent values, to be selected by the taxpayer. The rest of that sub-section I need not for the present purpose refer to. And the second paragraph of the 2nd sub-section is this: "The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year." That requires, in effect, that you are to take the amount of coal got in the accounting year and to apply to it the prices in this standard year. I say that for this reason: It appears to me perfectly plain that the words at the end of the paragraph, "the average prices governing the payment of the rent in that year," must refer back to the words in the first line of the paragraph, "each of the three years immediately preceding the first accounting year." I do not think the words grammatically would bear any other meaning. The other meaning which Mr. Blackburn suggested would, as he candidly admitted, make absolute nonsense, or rather would deprive it of all meaning. That being so, my Lords, all you have to do is to compare the pre-war standard with what is got in the particular year in the manner there defined. You have to do a simple sum in subtraction of the one from the other and then an excess of 50 per cent. is to be paid. Of course it is perfectly true that it may result in what seems a very extraordinary consequence, namely, that a man may, in cases where the production in the accounting year has for any reason fallen very low, be charged an excess profits duty when he is actually getting less income than he

was getting before the war. That is perfectly possible. It is not very probable, but it is a possible result. Of course we are not concerned with the reasons which led the Legislature to adopt this form of enactment. I think it is clear that it cannot have been accidental. It is not the result of any mere slip, because it has remained on the Statute-book during more than one year without alteration. And I think that reasons can be conceived why the Legislature should have desired to impose the tax in this way. Much as the Legislature wanted the tax, it was also obvious that it was still more vital for the national needs at this time that there should be an abundant supply of coal and that nothing should be enacted which might have any tendency to check the production of coal. Now of course the profits got from coal differ very much from the profits got from a business. What is not got in one year from a business may never be got at all; but with coal you have got the coal in the bowels of the earth; it is safe there, and may be got in subsequent years. This tax was one which everybody expected would be of a temporary nature, and which probably will be of a temporary nature, because it relates to excess profits in consequence of the war. Well, it might have been to the interest of the parties concerned if the working tenant and the landlord should have arranged between them that the production should be very much kept down in the accounting year, because the coal would remain there and might be got after a year or two when the war, and with it the war tax on excess profits, should have ceased. That is a possible reason for the enactment which we have got. At first sight, of course, it is a very startling enactment, because, as the heading of the group of sections shows to which this class belongs, the tax was to be on excess profits. It is Part III. of the Act, the title of which is "Excess Profits Duty," and one would prima facie have assumed that it would deal with cases, and cases only, in which there were excess profits. But the wording of s. 43 to my mind is so clear as to exclude altogether any argument that might otherwise have been drawn from the heading of the group of sections to which this clause belongs, and, whatever the reasons which led the Legislature to adopt this form of enactment may have been, all that we have to do is to construe the section, and for that reason I think that the decision of the Court below ought to be affirmed. I agree with what was said by counsel for the

H. L. (Sc.) 1918

MURRAY v. INLAND REVENUE COMMISSIONERS.

appellant that it is not a case in which the costs of the appeal should be given. It was necessary to have the point finally and authoritatively decided, and I therefore suggest to your Lordships that the appeal should be dismissed without costs.

VISCOUNT HALDANE. My Lords, Part III. of the second Finance Act of 1915 provides for a duty upon excess profits. As regards ordinary profits it introduces naturally and necessarily a standard defined as the pre-war standard, but the principle which remains is that substantially the tax is to be levied on the difference between what the person who takes the profits receives in the year of accounting, and what he has received in the years before the war, based on an average reached by selecting two years out of the three immediately preceding.

My Lords, that is simple enough, but into the middle of Part III., and in the fasciculus of sections which contains these provisions, there is introduced s. 43, which provides for an excess mineral rights duty. My Lords, when you turn to the nature of the provisions which relate to that duty, you are at once struck by the change which has been introduced. A new element comes in, an artificial definition of what is called " pre-war rent value."

My Lords, the scheme of the excess mineral rights duty is this. A man pays on the difference between the total of what he receives in respect of royalties during the year of accounting and what he is taken by the Act to have received in respect of the pre-war standard year. But then by the introduction of the reference to pre-war value the matter is put upon an artificial basis. He pays, not upon the actual difference between royalties in one period and the receipts in a later period, but he pays upon a quite different basis, ascertained by reference to a royalty varying with price, because it is only in the case of royalties varying with price that the section has any application. He pays, I say, upon the amount which he receives from these royalties in the year of accounting, minus so much as is arrived at by taking the same number of tons as had been raised in the year of accounting, and attributing to them a notional royalty corresponding to the figure which represents the pre-war average price.

Now, my Lords, it is quite obvious that this may be a very different thing from the excess profits which he would receive were it an

ordinary case of excess profits subject to duty as prescribed elsewhere in Part III. The difference which is here introduced may affect the Crown seriously, for if the number of tons in the year of accounting is greater, as it may happen to be, than it was in the pre-war period, then the Crown will not get so much as the real difference in total receipts. It may be that in the pre-war period there were faults or strikes or defective organization which have been so got over that an enterprising coal lessee, who was to pay the royalties, has been able to secure a larger output after the war than he did before. Such cases are probably not frequent, but I have no doubt that numerically there is a considerable number of them, having regard to the enhanced price which the war has brought about as regards coal. And if that happens, then the deduction will be of the same number of tons as in the accounting year, which by the hypothesis is larger than the actual amount of tons raised in the average of the pre-war years; and the only factor of difference will be, not the tonnage, but the difference in price.

My Lords, it is quite obvious that a man under these circumstances may be putting a great deal more into his pocket in the way of untaxed excess mineral royalties due in respect of mineral rights than would have been the case if it had been simply a question of the difference in profit between the two periods. But although that may happen, and although it makes the basis an artificial one as regards the Crown, a much more probable case is a case of real difficulty as regards the royalty owner. The Crown may get little, but it cannot lose. The landowner may not only not get much, but he may have to pay on what he has not received.

My Lords, the effect of the language used is that if a man's coal gives out by reason of faults, by reason of the seam coming to an end, by reason of strikes, or of some cause over which he has no control, he will suffer from the new tax just as much as he would have suffered if he had deliberately not allowed the coal to be worked and withheld it. Under those circumstances the basis of the duty seems from a business point of view a somewhat hazardous one. But the question is not what one may speculate upon as the natural or proper principle to have been adopted, but what the Legislature has said; and when I look at the words of the Legislature I come to the conclusion that s. 43, which contains the code, is completely

H. L. (Sc.) 1918

MURRAY v. INLAND REVENUE COMMISSIONERS.

Viscount Haldane.

unambiguous. Sect. 43 by sub-s. 1 defines the amount on which the duty is to be charged in the case of royalties which vary according to the price of the minerals as the difference between the amount received in the accounting year and the amount received in the pre-war standard period. Then the pre-war standard period is by the next sub-section defined to be " the average of any two of the three last pre-war rent values," and " pre-war value " is by the words occurring at the end of that sub-section defined in a way that to my mind leaves no ambiguity. Pre-war value is, as respects each of the three years immediately preceding the first accounting year, to be " taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of th rent in that year." My Lords, it is quite plain that what is to be taken as the basis of the element of deduction is the actual tonnage in the accounting year, and not, as one might have expected, the tonnage in the average of the pre-war years, because the Legislature has said so; and, as I have often had occasion to observe in this House, it is no duty of ours to speculate on the reasons which may have influenced Parliament, largely for the good reason that we do not know them. There may have been difficulties in taking the other course which have weighed with the draftsman. I am quite ready to suppose that this section was framed as it was deliberately. What the reasons may have been I do not know; they may have been good reasons, but we have nothing to do with them here. The words are clear, and therefore, as I have said, I agree that the appeal must fail, and I also agree that, as this is a question of far-reaching importance, it is not a case in which the House should follow its general rule of giving costs. On the other points I concur with what has been said by the Lord Chancellor.

LORD DUNEDIN. My Lords, in common with all who have had to interpret statutes, I have frequently experienced difficulties which more careful draftsmanship might have obviated. But I confess that the clauses which in this case your Lordships have to interpret do for blundering English surpass anything I have hitherto seen.

If the taxing clause in the Act of 1915 is to be operative at all,

you must read " having the right to work " as meaning " having had the right to give some one else the right to work." This has been clumsily interpreted in the subsequent statute of 1916, and I have no doubt that the words of 1915 must be read for the purpose of any question still pending in the light of those of 1916. Then in the subsequent clause which deals with the fixing of the pre-war rent value it is only the necessity to avoid a purely nonsensical result that forces one to strain the ordinary rules of grammar.

If this were all, it would not perhaps much matter. It is our duty to make what we can of statutes, knowing that they are meant to be operative, and not inept, and nothing short of impossibility should in my judgment allow a judge to declare a statute unworkable. But unfortunately the scheme, read as I have no doubt it must be read, really perpetrates what is in my opinion a great hardship. The underlying idea was clear enough. If a mineral owner let his minerals and stipulated for a payment or royalty which varied with the price of coal, it was simple enough, and most people would think just enough, to say that if the effect of the war was to enhance the price of minerals the increased profit to the mineral owner should be, like other profits, subjected to special taxation. If the tax had been calculated on the difference between the income received before and after the war, there would have been nothing to complain of. But the framers of the Act, by establishing a fictitious pre-war rent value as applied to the after the war output, omitted to deal with the position where, although the rate per ton might rise, the output might diminish, and the result is that a proprietor may have under the scheme to pay large excess profits when he actually receives a less sum of money for his minerals than he did before the war. This anomaly has been mitigated by subsequent legislation which does not affect the present case (1), but which, I confess, shakes my faith in the view which seems to have commended itself to your Lordships who have preceded me that this peculiar method was of set purpose. But with hardships we have nothing to do, and I do not think that there is any possible way of construing the Act itself except the one that leads to the result reached by the Court below, and I think the appeal should be dismissed.

(1) Finance Act, 1917, s. 20.

H. L. (Sc.) 1918

MURRAY v. INLAND REVENUE COMMISSIONERS.

LORD SHAW OF DUNFERMLINE. My Lords, I agree. Some royalties vary with prices. In such cases when prices rise royalties rise. The calculation for excess mineral rights duty under the second Finance Act of 1915 is the excess of the royalty now as compared with the average of the pre-war royalty. Once that excess of royalty is ascertained, the rest is a multiple of that into the tonnage won for the accounting year. That is what the statute means; all the judges who have dealt with this section think it does mean that; and I agree with them. There is excess duty on each ton and on each multiple of tons.

My Lords, I say no more upon the case except that I desire respectfully to adopt the judgment pronounced in the Court below by Lord Cullen, every word of which aptly expresses the view which I entertain.

Interlocutor of the judges of the Court of Session named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts affirmed and appeal dismissed.

Lords' Journals, May 6, 1918.

Agents for appellant: *Kekewich, Smith & Kaye, for Russell & Dunlop, W.S., Edinburgh.*

Agents for respondents: *H. Bertram Cox, C.B., Solicitor for England of the Board of Inland Revenue, for Sir P. J. Hamilton Grierson, Solicitor for Scotland of the Board of Inland Revenue, Edinburgh.*

[HOUSE OF LORDS.]

DAVIES AND OTHERS . . . . . APPELLANTS; AND POWELL DUFFRYN STEAM COAL COMPANY RESPONDENTS.

H. L. (E.)* 1918 March 19.

Mines—Surface Owner—Right to Support—Partition—Exception of Mines and Minerals—Power to enter for the Working of the Minerals "in as full and ample a manner as if these presents had not been made" — No Compensation Clause—Implied Right to let down Surface.

Orders in the Courts below discharged upon terms agreed by the parties.

APPEAL from a decision of the Court of Appeal (Lord Cozens-Hardy M.R., Warrington L.J., and A. T. Lawrence J.) affirming a judgment of Younger J. (1)

On July 24, 1916, Sargant J. ordered that the following question of law raised by the pleadings in the action should be set down to be disposed of before the trial of the action, namely, whether, by virtue of the exceptions, reservations, agreements, and declarations in the indenture of February 23, 1788, in the defence mentioned contained, the defendants (the respondents) were at all material times entitled to work the mines and minerals under the plaintiffs' (the appellants') lands called Cwmnoel in the pleadings mentioned in such a way as to cause the surface of the same lands or the buildings standing thereon to subside, and on July 27, 1916, he refused a motion to discharge this order.

The preliminary question of law was argued before Younger J. The learned judge being of opinion that the defendants were entitled so to work their minerals as to let down the surface of the plaintiffs' lands, and that the decision of this question substantially disposed of the action, dismissed the action, and an appeal from this judgment was dismissed by the Court of Appeal.

H. Terrell, K.C., and *MacSwinney*, for the appellants.

P. O. Lawrence, K.C., and *J. G. Wood*, for the respondents.

* *Present:* LORD FINLAY L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, and LORD WRENBURY.

(1) [1917] 1 Ch. 488.

H. L. (E.) 1918

DAVIES v. POWELL DUFFRYN STEAM COAL COMPANY.

The appellants' counsel having sought to raise certain issues which the House held were not open to him upon the preliminary question of law: the respondents not objecting, their LORDSHIPS offered the appellants the option of proceeding with the appeal without raising the issues in question or having the orders in the Courts below discharged with a view to the trial of the action, upon the terms of their paying the respondents' costs up to date.

Eventually the parties agreed to the following order:—

Ordered and adjudged, that the orders of the Court of Appeal and the judgment of Younger J., and also the two orders of Sargant J., be discharged; the appellants to pay the costs of the action subsequent to the order of July 24, 1916, *and also the costs of the appeal to the Court of Appeal and of the appeal to this House. The costs of the action up to and including the order of July* 24, 1916, *to be costs in the cause. Further ordered, that the respondents do retain the amount of the costs of the action as taxed up to and including the order of July* 24, 1916, *the amount of such costs to be set off against the amount of the costs to be paid by the appellants in respect of the appeal to this House, the payment of the balance of such last mentioned costs not to be enforced until the final disposal of the action and of any appeal or appeals to the Court of Appeal and to this House. Further ordered, that the appellants and respondents have liberty to amend their pleadings as they may be advised.*

Lords' Journals, March 19, 1918.

Solicitors for appellants: *Ullithorne, Currey & Co., for D. W. Jones & Co., Merthyr Tydfil.*

Solicitors for respondents: *Bell, Brodrick & Gray, for C. & W. Kershole & Prosser, Aberdare.*

[PRIVY COUNCIL.]

DE VERTEUIL . . . . . APPELLANT;

AND

KNAGGS AND ANOTHER . . . . . RESPONDENTS.

J. C.*
1918
March 21.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Trinidad—Governor—Transfer of indentured Immigrants—Exercise of discretionary Power—Duty to inquire—Right of Employer to be heard —Hearing after ex parte Order—Immigration Ordinance, No. 161, *s.* 203.

The power given by s. 203 of the Immigration Ordinance of Trinidad to the Governor, "on sufficient ground shown to his satisfaction," to transfer the indentures of immigrants from one employer to another cannot properly be exercised without inquiry; except in special circumstances such as an emergency, any person against whom a complaint is made must be given a fair opportunity to make any relevant statement, and to controvert any relevant statement made to his prejudice.

The discretion is properly exercised when, after an order has been made ex parte in consequence of complaints by the Protector of Immigrants, the employer and his manager are given a fair opportunity to answer the complaints, and the order is put into operation only after a consideration of their explanations.

APPEAL from a judgment of the Supreme Court (June 24, 1916) reversing a judgment of Blackwood Wright J.

The appellant, the owner of an estate in Trinidad, sued the respondents, the acting Governor of Trinidad and the Protector of Immigrants, for a declaration that an order made under s. 203 of the Immigration Ordinance for the transfer of the immigrants indentured on the estate was of no effect, and for an injunction.

The facts appear from the judgment of their Lordships.

The trial judge, Blackwood Wright J., held that the power to make the order could only be exercised after the person against whom the order was to be directed had been fully informed of the case against him and had been properly heard upon it; that the

* *Present:* EARL LOREBURN, LORD DUNEDIN, LORD SUMNER, and LORD PARMOOR.

J. C. 1918 DE VERTEUIL v. KNAGGS.

order must be taken to have been made upon January 21, 1916, and that, as upon that date the appellant and his manager had not been fully informed of the case against them, the order was improperly made; he accordingly granted an injunction.

Upon appeal to the Full Court (Lucie Smith C.J. and Russell J.) the decision was reversed. The learned judges agreed with the view that the appellant was entitled to be heard in answer to the complaints, but thought that he had had a sufficient opportunity to meet the case against him.

1918. Feb. 15, 21. *Austen-Cartmell*, for the appellant. The discretionary power conferred by s. 203 was not properly exercised and the order is invalid. The making of the order was not an act of State but an act of a quasi-judicial character affecting the appellant's rights of property. He was therefore entitled to full information as to the case made against him, and a reasonable opportunity to reply to it: *Cooper* v. *Wandsworth Board of Works* (1); *Capel* v. *Child* (2); *Board of Education* v. *Rice*. (3) The order was made on December 16, 1915, and at that date the appellant had no information as to the complaints. What subsequently took place is not material. But even if the order can be regarded as having been made on January 21, or on March 15, 1916, the appellant had not a sufficient opportunity of stating his case before either of those dates. In *Local Government Board* v. *Arlidge* (4) the respondent knew all the facts, and the case is therefore distinguishable; the principle now relied on was stated by Hamilton L.J. in the Court of Appeal (5) and approved in the House of Lords.

Giveen, for the respondents, was not called upon.

March 21. The judgment of their Lordships was delivered by

LORD PARMOOR. The appellant has been for several years the owner of the La Gloria estate, in the ward of Upper Caroni, in the Island of Trinidad. The respondent the Honourable Samuel William Knaggs, C.M.G., was at all material dates the acting Governor of the Colony of Trinidad and Tobago, and the respondent

(1) (1863) 14 C. B. (N.S.) 180.
(2) (1832) 2 Cr. & J. 558.
(3) [1911] A. C. 179.
(4) [1915] A. C. 120.
(5) [1914] 1 K. B. 160.

the Honourable Arnauld de Boissière was at all material dates the head of the Immigration Department of the said Colony and the Protector of Immigrants. The question involved in the appeal is whether an order made by the acting Governor for the transfer of the indentures of the immigrants indentured on the said La Gloria estate is a valid and effective order. This question was answered in the negative by Blackwood Wright J. and in the affirmative by the Supreme Court sitting in appeal. The contention of the appellant is that the order of Blackwood Wright J. was correct, and that the order of the Supreme Court should be reversed.

The Immigration Ordinance No. 161, as amended by subsequent Ordinances, contains the provisions applicable to the introduction and employment of immigrants in the Colony of Trinidad and Tobago. Sect. 203 provides: "If at any time it appears to the Governor, on sufficient ground shown to his satisfaction, that all or any of the immigrants indentured on any plantation should be removed therefrom, it shall be lawful for him to transfer the indentures of such immigrants for the remainder of their respective terms of service to any other employer who may be willing to accept their services and pay the remaining indenture fees; . . . ." It was under this section of the Ordinance that the Governor made the order to which the appellant takes objection. There is no doubt that if the acting Governor did act in good faith within the limits of the authority conferred by the Ordinance he is fully protected, and no Court has any power to interfere. The case of the appellant, as stated in the indorsement of his writ of summons, is that the order was not made under the proper and statutory exercise of the discretion vested in the acting Governor by s. 203 of the Ordinance, and is consequently null and of no effect. It is clearly within the power and jurisdiction of the municipal Courts to entertain this question, and to determine whether the acting Governor, in making the order, which the appellant impugns, acted within the limits of the powers conferred on him by a municipal Ordinance.

Sect. 203 of the Ordinance empowers the Governor to transfer the indentures of the immigrants "on sufficient ground shown to his satisfaction, that all or any of the immigrants indentured on any plantation should be removed therefrom." The same section

J. C. 1918 — DE VERTEUIL v. KNAGGS.

empowers the Protector of Immigrants to make a temporary transfer "pending the decision of the Governor," but it is under the earlier portion of the section that the present case has arisen. The Ordinance does not prescribe any special form of procedure, but there is an obvious implication that some form of inquiry must be made, such as will enable the Governor fairly to determine whether a sufficient ground has been shown to his satisfaction for the removal of indentured immigrants. The particular form of inquiry must depend on the conditions under which the discretion is exercised in any particular case, and no general rule applicable to all conditions can be formulated. In the particular case under appeal the acting Governor exercised his discretion on a complaint made against the appellant by the Protector of Immigrants with regard to the treatment and condition of indentured immigrants on his La Gloria estate. What is the procedure which in such a case the law will imply when the Legislature is silent? The acting Governor was not called upon to give a decision on an appeal between parties, and it is not suggested that he holds the position of a judge or that the appellant is entitled to insist on the forms used in ordinary judicial procedure. It would not be possible to follow such procedure, since the acting Governor has no power to examine witnesses or to administer an oath. There is, moreover, no allegation that the acting Governor did not act throughout in perfect good faith.

On the other hand, the acting Governor could not properly carry through the duty entrusted to him without making some inquiry whether sufficient grounds had been shown to his satisfaction that immigrants indentured on the La Gloria estate of the appellant should be removed. Their Lordships are of opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice. It must, however, be borne in mind that there may be special circumstances which would justify a Governor, acting in good faith, to take action even if he did not give an opportunity to the person affected to make any relevant statement, or to correct or

controvert any relevant statement brought forward to his prejudice. For instance, a decision may have to be given on an emergency, when promptitude is of great importance; or there might be obstructive conduct on the part of the person affected. Their Lordships, however, do not find any suggestion of such conditions in the case under appeal. Moreover, in this case the Supreme Court, on the evidence before them, has found that the acting Governor did give the appellant a fair opportunity of being heard and of meeting statements made to his prejudice, and, for reasons given later, their Lordships fully concur in this finding.

In *Board of Education* v. *Rice* (1) the question raised was whether the Board of Education had properly exercised their statutory duty to decide on appeal a question between parties. The statement of principle made in that case by the Lord Chancellor (Earl Loreburn) is, however, in the opinion of their Lordships, applicable to the conditions under which the decision in this case was given by the acting Governor: "In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. . . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view." (Cf. *Spackman* v. *Plumstead District Board of Works* (2) and *Local Government Board* v. *Arlidge*. (3))

The only remaining question to consider is whether the acting Governor did comply with the requirements of a fair inquiry.

On December 16, 1915, the acting Governor ex parte, and affording no opportunity to the appellant to make any answer or explanation, made an order for the removal of the indentured immigrants from the La Gloria estate and for the transfer of their indentures to some other employer. The first intimation which the appellant received was in a letter of December 20, 1915, from the Protector of Immigrants to the appellant's manager. This letter sets out

(1) [1911] A. C. 179, 182. (2) (1885) 10 App. Cas. 229.
(3) [1915] A. C. 120.

J. C. 1918 — DE VERTEUIL v. KNAGGS.

under four heads the complaints made by the Protector of Immigrants with regard to the indentured immigrants on the La Gloria estate. The complaints are: 1. That they were not receiving proper medical attention. 2. That they were dissatisfied because of their isolated condition. 3. That the number of convictions was high. 4. That the wages earned were comparatively small.

After the receipt of this letter the appellant and his manager sought and obtained a personal interview with the acting Governor on December 23, 1915. There is some discrepancy as to the statements made at this interview, but the material factor is that the appellant and his manager were granted a fair opportunity of placing before the acting Governor their answer to the allegations made in the letter of the Protector of Immigrants. At this interview a question was raised as to the accuracy of certain figures, and subsequently on December 27, 1915, the appellant's manager wrote to the Colonial Secretary enclosing a copy of the register of cases before the magistrates for the La Gloria estate from October 1, 1914, to December 30, 1915, and giving particulars tending to show that the authorities had arrived at their figures on a wrong basis and that further inquiry was necessary. On January 7, 1916, the Colonial Secretary wrote to the appellant's manager stating that the letter of December 27 had received careful consideration, but "in view of the report of the Protector of Immigrants, his Excellency regrets that he does not feel justified in cancelling the order made for the removal of the indentured immigrants from the estate in question." After further correspondence the Colonial Secretary on January 21, 1916, wrote to the appellant's manager, and stated that, on the figures submitted, "his Excellency saw no cause to cancel the order made." There appears to have been a further investigation of the figures, and finally on March 15, 1916, the Protector of Immigrants wrote to the appellant's manager that the acting Governor "has decided that the immigrants on the La Gloria estate must be removed therefrom and transferred to another estate, the manager of which is willing to accept them." It appears to their Lordships that the correspondence, to which reference has been made, shows that the acting Governor did not proceed without giving fair notice to the appellant of the charges made against him, or without giving him a fair opportunity to

J. C. 1918 DE VERTEUIL v. KNAGGS.

make an answer to such charges. It is no part of the duty of a Court to review the discretion exercised by the acting Governor, and the evidence directed to this issue is, in the opinion of their Lordships, irrelevant. It was argued on behalf of the appellant that the validity of the order should be tested either as on December 16, 1915, or at the latest as on January 21, 1916, but there is no reason why the acting Governor may not at any time review or alter a decision previously given, and it may be his duty to do so, in the prudent exercise of his discretion, on a further consideration of all the relevant factors after full inquiry.

For these reasons the appeal fails, and their Lordships will humbly advise His Majesty to dismiss the same with costs.

Solicitors for appellant: *J. N. Mason & Co.*
Solicitors for respondents: *Burchells.*

[PRIVY COUNCIL.]

J. C.* 1918 *Feb.* 11.

JOHN AND OTHERS . . . . . APPELLANTS;

AND

DODWELL AND COMPANY, LIMITED . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Conversion of Cheques—Cause of Action—Recovery of Trust Fund—Limitation—Concealed Fraud—Money received—Waiver of Tort—"Beyond the Seas"—Ceylon Ordinance 22 *of* 1871, *ss.* 8, 10, 11, 14, 15.

The respondents authorized the manager of their business at Colombo to draw cheques in their names upon their banking account for the purposes of the business. In 1909 and 1910 the manager bought shares on his own behalf through the appellants as brokers, and in payment of the price fraudulently gave them cheques drawn by him upon the respondents' account. The appellants received the amount of the cheques without fraud but with knowledge that the manager, without apparent authority, was drawing for his own purposes upon the respondents' funds.

---

* *Present:* VISCOUNT HALDANE, LORD SHAW OF DUNFERMLINE, and SIR WALTER PHILLIMORE, BART.

J. C.
1918
JOHN
v.
DODWELL
AND
COMPANY.

The appellants paid over the proceeds of the cheques (except a small part) to the sellers of the shares. The respondents did not discover the fraud of their manager until October, 1911. In January, 1913, they sued the appellants in Ceylon to recover the amount of the cheques.

Ordinance 22 of 1871 of Ceylon provides the following periods of limitation for actions: By s. 8 for money received to the use of the plaintiff, three years; by s. 10 "for any loss, injury or damage," two years; by s. 11 for any cause of action not expressly provided for, three years. By ss. 14 and 15 the periods in certain cases are extended in the event of "absence beyond the seas" of the person entitled to sue:—

Held—(1.) that s. 10 applied to an action for damages for conversion, but that the respondents also had a cause of action to recover the money as held in trust for them; (2.) that for the latter cause of action the period was three years from the date of the transactions, and that, whether under English law or Roman-Dutch law as administered in Ceylon, no new cause of action arose when the fraud was discovered, since the fraud was not that of the appellants nor of any person for whom they were responsible; (3.) that the action accordingly succeeded as to the last two cheques, but was barred as to the first two cheques; (4.) that ss. 14 and 15 did not apply to a corporation registered in England but carrying on business in Ceylon.

Quaere, whether, supposing the action had to be treated as one for money received to the use of the respondents (which, however, was not necessary), the respondents by waiving the tort had ratified the instructions given by their manager to the appellants to pay the money over to the sellers.

APPEAL from a judgment of the Supreme Court of Ceylon (March 22, 1915) reversing a judgment of the District Court of Colombo.

The respondents on January 30, 1913, sued the appellants in the District Court to recover Rs.1,45,860, being the amount of four cheques, dated respectively June 15, 1909, October 12, 1909, May 3, 1910, and May 5, 1910, drawn upon their banking account by their manager and fraudulently given by him to the appellants in payment for shares bought upon his own behalf.

The facts are fully stated in the judgment of their Lordships.

The District Judge held that the action had to be regarded as one for money received to the use of the respondents, and that by waiving the tort they had ratified the action of the appellants in paying the proceeds of the cheques to their principals before notice

of the respondents' claim. He gave judgment for Rs.14,751, part of the last cheque, that amount having been paid by the appellants to their principals before the receipt of the cheque.

Both parties appealed to the Supreme Court. Pereira, Ennis and Shaw JJ., who heard the appeals, by a majority (Ennis J. dissenting) entered judgment for the full amount claimed less a sum recovered by the respondents in their manager's insolvency. The majority held that a new cause of action arose in October, 1911, when the respondents discovered the fraud of their manager, and that consequently no part of the claim was barred by the Prescription Ordinance. Ennis J. was of opinion that the whole claim was barred by s. 10 of that Ordinance.

1917. Nov. 29, 30. *Hawke, K.C., Brooke-Elliott,* and *Morle,* for the appellants. The appellants are not liable for any part of the amount claimed. The claim in conversion is barred by s. 10 of Ordinance 22 of 1871. Nor can the respondents recover for money received to their use. The appellants paid the whole amount to their principals before receiving notice of the respondents' claim; the authorities show that that fact is a valid defence: *Holland* v. *Russell* (1); *Bavin, Junr. & Sims* v. *London and South Western Bank* (2); *In re Ely* (3); *Owen & Co.* v. *Cronk* (4); *Morison* v. *London County and Westminster Bank.* (5) The respondents by suing for money received to their use waived the tort and are precluded from saying that the payment over of the money was wrongful. They are also so precluded in that they proved in the insolvency of their manager: *Rice* v. *Reed.* (6) Under the Ceylon Insolvency Ordinance 7 of 1853 they could only prove for a debt. The same principles apply to the sum of Rs.14,751 which the appellants paid over out of their own funds in anticipation of the receipt of the last cheque.

Further, the appellants were holders in due course of the cheques. They were not the less so because they were payees and not indorsees: per Fletcher Moulton L.J. in *Lloyd's Bank* v. *Cooke* (7);

(1) (1863) 4 B. & S. 14.
(2) [1900] 1 Q. B. 270.
(3) (1900) 48 W. R. 693.
(4) [1895] 1 Q. B. 265.
(5) [1914] 3 K. B. 356, 386.
(6) [1900] 1 Q. B. 54.
(7) [1907] 1 K. B. 794, 808.

J.C. 1918 JOHN v. DODWELL AND COMPANY.

though see *Herdman* v. *Wheeler*. (1) As to the last two cheques, having regard to the earlier transactions, the manager was held out as having authority to draw upon the respondents' account for his own purposes. In any case the action is barred as to the first two cheques by limitation. There having been admittedly no fraud on the part of the appellants, no new cause of action for concealed fraud arose.

Upjohn, *K.C.*, and *R. A. Wright*, *K.C.*, for the respondents. Upon the facts the appellants, although not fraudulent, must be taken to have known that the money was that of the respondents. They were accordingly fiduciary agents for the respondents, who were entitled to recover the money as a trust fund. But whether the action is so treated, or is treated as one for money received, there was no ratification of the payment over to the appellants' principal. The only ratification was of the manager's act in drawing the cheques and turning them into money; the application of the money was in no way affirmed. It is conceded that in English law the fraud of a person other than the defendant does not come within the principle of concealed fraud, and in Roman-Dutch law the same appears to be the case: Digest, Bk. 44, tit. 4, ss. 2 (1.), 4 (17.). It is therefore admitted that the action is barred as to the first two cheques.

Hawke, *K.C.*, in reply. The appellants had not actual or constructive notice that the money was that of the respondents. No case for the return of trust money is made by the pleadings. In any case that cause of action and an action for money received to the use of the plaintiff are governed by the same consideration—namely, ought the defendant ex aequo et bono to refund the money: *Moses* v. *Macferlan*. (2) If the cause of action is purely equitable the respondents are precluded from recovering by their laches.

[VISCOUNT HALDANE. This is not a question of an equitable interest, but of a right in rem; laches are therefore no bar.]

1918. Feb. 11. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Ceylon. The question is whether the respondents were entitled to recover from the appellants the whole or part of

(1) [1902] 1 K. B. 361. (2) (1760) 2 Burr. 1005.

a sum of Rs.1,45,860, being the aggregate of the amount of four cheques, drawn by one Williams, as the respondents' manager, in favour of the appellants.

The facts of the case are shortly these: The appellants are partners in the firm of E. John & Co., carrying on business as share and produce brokers in Colombo. The respondents are a company incorporated and registered in England, and carrying on business as import and export merchants at various places, including Colombo, through branch offices. Williams had acted as their manager of that branch since 1905. He held a power of attorney which enabled him to conduct the business of the respondents at Colombo, and for that purpose conferred on him wide powers, including the drawing of cheques on their bankers. The respondents had transacted business with the appellants, relating in the main to the purchase and sale of produce. The latter had in their books an account with the respondents, and they had also opened a separate account with Williams, who employed them in the purchase and sale of shares. With Williams the appellants thus came into business relations in two capacities: in general business he dealt with them as the respondents' agent, but so far as his dealings in shares were concerned, these were private transactions on his own account as principal, and not as agent He was reputed to have made a good deal of money by dealings of this kind, and he owned shares on which the appellants were able to procure advances for him when he needed them.

Williams had bought and sold shares largely in both of what were known as the rubber booms of 1905 to 1906, and of 1909 to 1910. He had employed the appellants and other brokers in these transactions. In the period of the second boom his dealings through the appellants were large, and in the course of these dealings he paid to them large sums for purchases and was credited with large sums for sales. Among the sums he paid to them were the amounts of the cheques in question. These were drawn as follows:—June 15, 1909, Rs.11,517.50; October 12, 1909, Rs. 20,102.50; May 3, 1910, Rs.67,500; May 5, 1910, Rs.46,740—total, Rs.1,45,860. The cheques were drawn by Williams under his power of attorney in the name of the respondents and on their bankers, but they were in fact drawn, not in the conduct or for the purposes of the business

J. C. 1918 JOHN v. DODWELL AND COMPANY.

of the respondents, but in the private interest of Williams himself, to be used in his own transactions. The employment of the funds of the respondents for this object was plainly outside the general authority entrusted to Williams. In so using them he was guilty of fraud, and when the respondents, his principals, discovered what he had done, they not only claimed against him and proved in his subsequent insolvency, but took criminal proceedings against him, which ended in a conviction.

At the trial before the District Judge of Colombo it was found that the appellants were neither in fact dealing with Williams as the respondents' agent nor believed themselves to be so. The District Judge held, however, equally clearly, that the appellants were not personally aware that they had received among the items paid over to them for the purchase-money of the shares which they bought for Williams, as his brokers, cheques fraudulently drawn on the respondents' funds, and that they took the cheques honestly, without noticing the names of the drawers, and without thinking of them as in a different position from the other cheques received in the course of their transactions with him. But it is obvious that the appellants' clerks, who brought the cheques to the partners for indorsement must have seen that the name of the drawers was that of the respondents. However little the clerks may have known of Williams' real transactions, and however innocently the cheques were brought and indorsed, the knowledge of the names on the part of the clerks was the knowledge of the appellants. That the cheques so tendered by Williams should have been accepted by the appellants, and paid into their own account, to enable them to provide the prices due to the sellers of the shares, is not strange, for Williams was reputed to be a rich man and he occupied a position of trust under the respondents, whose representative he was in Colombo. With Williams the appellants, like other brokers, had had many transactions, and none of them had resulted in any difficulty. What he was doing might have been loose practice, and not in the ordinary course of business. But it was not uncommon for employers to allow considerable latitude as regards drawing cheques to their confidential agents. However, it is none the less clear that, innocent of fraud as the appellants were found to be, they, by the action of

their clerks, took an unmistakable and grave risk in the transactions in question. On the face of these Williams was, without showing authority to do so, drawing cheques for his own purposes on the respondents' funds at their bankers. If it turned out that the respondents had not allowed him to do so, and would not ratify his action, the notice which the appellants had got through the agency of their clerks of what was prima facie a breach of duty on his part would deprive them of all title to hold the cheques as against the respondents, if the latter should challenge the transaction. For when an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing, he is, by virtue of doctrines which apply under the law of Ceylon, as they do under the law of this and other countries, in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal. That there is no privity of contract between him and the principal does not make any difference, for the title does not rest on contract. The property belongs to the latter in the contemplation of Courts which administer equity, whether in the form in which the Court of Chancery in this country applied it to trusts, or in the form which later developments of the Roman law have recognized.

It is therefore clear that, excepting in so far as the lapse of time or some other special circumstance afforded them a defence, the appellants could not withhold the money in question from the respondents if they chose to claim it.

The respondents did claim it, and commenced an action on January 10, 1913, to enforce their claim. The claim as formulated in their plaint was alternative. In the first alternative they expressed it as for money had and received; in the second, as for a conversion; in the third, as for cheques received with notice of Williams' fraud. In the judgments in the Courts below it was the first and second of these alternative forms of claim which received attention. Their Lordships are of opinion that the course so taken was unnecessary. It would have been, in their opinion, sufficient to have disposed of the case on the footing that the money was, in the

J. C. 1918 — JOHN v. DODWELL AND COMPANY.

circumstances, what may properly be called trust money, consistently with principles of jurisprudence based in part, though not wholly, on a foundation of Roman law. If the appellants received such money with notice of the trust affecting it, they would be bound to account for it to the respondents. It is on this footing that their Lordships propose to deal with the question. The case was not disposed of in this way in the judgments below, but the facts proved and the pleadings admit of its being thus dealt with.

It may well be true that the principles of the English common law have been so far recognized in the jurisprudence of Ceylon as to admit of the same question being treated as one of a conversion having taken place. If so, undoubtedly there was a conversion according to these principles. But in that view difficulties might arise as to the time limited for bringing the action for conversion under the Prescription Ordinance, to which reference will be made later on. If the case is regarded, on the other hand, as similarly it may be, from the point of view of money had and received to the respondents' use by the appellants, the difficulty is less, for the period of limitation prescribed by the Ordinance is three years instead of two, as in the alternative of conversion, and this would have rendered the transaction still actionable in the case of the two cheques latest in date. But a point would arise, if the claim were treated, as it was in the argument at the Bar, as one for money had and received, which is not unattended with difficulty. The cheques were paid by Williams to the appellants with instructions to apply them in payment of the price of the shares. This the appellants actually had done before receiving from the respondents notice not to do so. The action for money had and received is, according to the law of England, in its nature one of assumpsit, founded on implied or imputed contract, and depends on a waiver of any tort committed, and on the correlative affirmance of a contractual relation. But what is the effect and extent of such affirmance? In a simple case, such as that of a wrong-doer having taken property of the plaintiff and sold it at a price beyond its ordinary market value, there is no difficulty. The question of affirmance here concerns only the relation between two persons, the owner and the tortfeasor, and by waiving the tort and treating the latter as his agent in selling, the owner secures the advantage

of the high price received. But what if between the owner and the tortfeasor there has intervened an agent for whom alone the tortfeasor has acted, and whose directions he has carried out, say, by paying over the price to him before he received notice from the true owner not to do so? Does the waiver of the tort ratify the action of the agent in giving instructions to the person who would, apart from ratification, have been a wrong-doer, so as to justify what would otherwise have been the wrongful act of paying over the price in accordance with the direction given by the agent? Can the contractual relation be split up and only part of it be approbated while the rest is reprobated, and can any obligation based on his contract be imputed to the person whose tort is waived inconsistent with the actual contract which he, in point of fact, made with the intermediary? Can the agent's intervention be eliminated if ratification of a contract is implied when a claim for money had and received is made? Reference was made at the Bar, and also in the judgment of the learned judge who tried the case, to the dictum of Sir Walter Phillimore at the end of his judgment delivered by him when a Lord Justice of Appeal in *Morison* v. *London County and Westminster Bank* (1), to the effect that in an action for money had and received it is assumed that there was no wrongful act in receiving the money, and that therefore the plaintiff cannot complain if it is properly paid over before a licence to do so is revoked. It is, in the view their Lordships take, unnecessary to consider how far the principle of this dictum would extend in circumstances such as those of the present case, or what is the true view of the scope of the ratification which this action implies by the English common law. For under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases "where the defendant has received money which ex aequo et bono he ought to refund." If, as in Ceylon, there is no necessity to find an actual contract or to impute the fiction of a contract, inasmuch as every Court can treat the question as one not merely of contract, but of trust fund where necessary, there is no difficulty in extending the remedy to

(1) [1914] 3 K. B. 356.

J. C. 1918 JOHN v. DODWELL AND COMPANY.

all the cases covered by the words just quoted. Lord Mansfield, who used them in his judgment in *Moses* v. *Macferlan* (1), went far in this direction, so far as appearances are concerned. But, as has been pointed out by Lord Sumner in his judgment in *Sinclair* v. *Brougham* (2), it is by no means clear to what extent he really can be taken to have intended to import equitable principles into the jurisdiction of the Courts of common law in entertaining this action. Undoubtedly it is one based on contract, for the common law could take no notice of any trust, but the contract imputed may conceivably have become so much the creature of legal fiction that it can be imputed without reference to all the circumstances of the whole of the relations of the parties, and accordingly in such a fashion as to exclude the effect of the directions of the intervening agent in a case like the present. The learned judge who tried the case did not adopt this view, but apparently thought that the entirety of the actual contract must be treated as affirmed. But the point is one which their Lordships are reluctant to deal with unnecessarily in an appeal from a Court which was not confined to administering the common law of England, and, as they are of opinion that the present appeal can be disposed of on the other principle referred to, they abstain from expressing any view of the result of the argument addressed to them about the scope of the alternative claim for money had and received.

The next question to be dealt with is that which was raised under the Prescription Ordinance (22 of 1871). Sect. 10 of this Ordinance, like ss. 8 and 11, contains provision for limitation of the time within which the actions that fall within it may be brought, and does not purport to extinguish the obligation as in the case of prescription properly so called. It provides that no action is to be maintainable for any loss, injury, or damage unless within two years from the time when the cause of action has arisen. Their Lordships think that the words used are to be interpreted as covering a conversion, and not as in their meaning restricted to personal loss, injury, or damage, and that an action for a conversion would therefore be barred after two years from its cause. Sect. 8 gives a three-year period for limitation of the actions falling under it. It extends, inter alia, to actions for the recovery of any movable

(1) 2 Burr. 1005, 1012. (2) [1914] A. C. 398, 455.

property, or for money received by a defendant for the use of a plaintiff, or for money due on an unwritten promise or contract. As the claim in the present case is not merely for conversion, but alternatively to recover what is in effect a trust fund, it falls within this section or else within s. 11, which allows a three-year period in cases not expressly provided for. The present action was therefore brought in time so far as concerns the two cheques latest in date, but it was out of time as regards the two earlier cheques unless a fresh cause of action arose later than the dates on which the appellants dealt with them.

It was argued below that the fraud committed and concealed by Williams was such a cause of action, and that where a Court is proceeding in accordance with equitable principles the cause of action can be treated as not having arisen until the fraud was discovered and the plaintiff was able to elect as to the course which he should adopt. In such a case the concealment of the fraud would be itself a fraud, giving rise to a new cause of action. This is true, unless there is some Statute of Limitation which binds the Court of Equity to treat the cause of action as arising when the actual fraud takes place. If there is such a statute it must receive effect. Under the law of England the Statute of Limitations did not apply to any jurisdiction of Courts of Equity which was not strictly concurrent with the jurisdiction of the Courts of common law over causes of action which were within it.

The statute did not apply to jurisdiction which was concurrent merely by analogy, although equity in such cases followed the analogy of the statute, and even this second analogy was not applied when the jurisdiction was really exclusive. Courts of Equity in this country ignored the analogy of the statute in cases of trust, to which it did not apply. The Prescription Ordinance of Ceylon governs the whole of a jurisdiction which is general, including law and equity in one system, and therefore the Ordinance is operative in the present case to bar the claim to the extent of the two earlier cheques, unless the cause of action can be shown to have arisen later than their dates because of discovery for the first time of a concealed fraud. Now, no doubt Williams himself concealed a fraud. But the appellants were innocent, excepting in so far as they must be taken to have had notice to

J. C. 1918 JOHN v. DODWELL AND COMPANY.

the extent already referred to. Where the cause of action is for concealed fraud, must the fraud be that of the defendant personally, or of some person for whose action in doing so he is directly responsible? No authority from Ceylon was cited at the Bar on this question, but their Lordships think that on principle the answer must be in the affirmative. Mere notice of want of title is not enough, unless there is such notice of actual fraud as extends to the defendant a fiduciary obligation to disclose what it becomes fraudulent on his part to conceal. This appears to have been the view held by the Roman lawyers, on whose system the law of Ceylon is founded. In Book 44, title 4, of the Digest there are collected the opinions of Ulpian and other jurists on the "exceptio doli mali." Among these opinions and the illustrations which their authors offer are the following:—Sect. 2 (1.): ". . . . non in rem 'si in ea re nihil dolo malo factum est': sed sic 'si in ea re nihil dolo malo actoris factum est.' Docere igitur debet is, qui obicit exceptionem, dolo malo actoris factum, nec sufficiet ei ostendere in re esse dolum . . . ." Sect. 4 (17.): "In hac exceptione et de dolo servi vel alterius personae iuri nostro subiectae excipere possumus et de eorum dolo, quibus adquiritur. Sed de servorum et filiorum dolo, si quidem ex peculiari eorum negotio actio intendatur, in infinitum exceptio obicienda est: si autem non ex peculiari causa, tum de eo dumtaxat excipi oportet, qui admissus sit in ipso negotio quod geritur, non etiam si postea aliquis dolus intervenisset; neque enim esse aequum servi dolum amplius domino nocere, quam in quo opera eius esset usus."

Mr. Upjohn, in arguing the case of the respondents, with conspicuous fairness, drew their Lordships' attention to these passages in the Digest. They think that they illustrate a general principle, applicable in Ceylon or in England, that to enable the defence of concealed fraud to be relied on as giving a new cause of action the fraud must be shown to be the fraud either of the defendant himself or of some one for whose action in the matter in question he has assumed responsibility. In the Roman law, where the doctrine of agency was never fully developed, illustrations taken from the relations of master and slave or father and son are often, as here, of much value as illustrations of a principle which in later systems became widely applied. The passage quoted shows that the doc-

trine of imputed fraud was closely confined in its application by the Roman jurists to the defendant either actually guilty of or legally responsible for the fraud. Their Lordships are therefore of opinion that, according to the law of Ceylon, the cause of action accrued, under the circumstances of this case, at the dates when the cheques were received and dealt with by the appellants, and that the respondents are accordingly entitled to succeed as regards the last two cheques, those of May 3 and 5, 1910, but not as regards the two earlier cheques dated in 1909.

The learned District Judge of Colombo, Mr. Garvin, in his very careful judgment, held that ss. 14 and 15 of the Prescription Ordinance, which enact that if the person entitled to sue is beyond the seas time is not to run until this disability is removed in cases falling within ss. 6, 7, 8, 9, and 11 of the Ordinance, did not apply to a corporation having its registered office outside Ceylon if it had a residence and carried on business inside the island. With this view, which was also that adopted in the Court of Appeal, their Lordships concur.

The learned District Judge held that the claim was in reality one for money had and received, and that on this footing the respondents had, by waiving their right to proceed on the footing of tort, ratified the payments made to the sellers of the shares by the appellants before they had notice not to make these payments. As the result he held that the liability of the appellants was limited to Rs.14,751, part of the amount of the last cheque, which had not been paid over to the sellers, but had been applied in liquidation of Williams' indebtedness to the appellants. But their Lordships have already intimated the opinion that the liability extends to the entire amount of the two latest cheques, and this liability can be diminished only by the amount which the respondents have already received by proving in Williams' insolvency. With what the learned judge said in refusing to accept the argument for the appellants as to estoppel by the proof of the respondents in the insolvency, and by their dilatoriness, their Lordships are in agreement.

The Supreme Court varied the decision of the District Judge. By a majority they held that the cause of action arose when Williams' frauds were discovered in October, 1911, that the Prescription

J. C.
1918
JOHN
v.
DODWELL
AND
COMPANY

Ordinance therefore did not bar the claim, and that the respondents were entitled to the entire amount of the four cheques, a total of Rs.1,45,860, with interest up to the date of the plaint and with further interest until payment, less only the amount recovered by proof in the insolvency. They thought that, in order to prevent the cause of action being held to have arisen when the cheques were dealt with, it was sufficient to show that the appellants had obtained them from a person who had committed a fraud and concealed it, although the appellants themselves had not been guilty of fraud. They were influenced in coming to this conclusion by decisions of the English Court of Chancery, such as that of Lord Eldon in *Huguenin* v. *Baseley* (1), who said, in his judgment, that he should " regret that any doubt could be entertained whether it is not competent to a Court of Equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence, of others." But their Lordships have to point out that Lord Eldon was not there speaking of any new cause of action arising from a concealed fraud. No such question had arisen. He was simply illustrating the view taken by Courts of Equity in England when ordering the restitution of what they treated as a trust fund, and so exercising a jurisdiction which was exclusive, and to which no Statute of Limitation had any application. In the present case there is a Statute of Limitation, and in order to escape from its application it is necessary to show that there is a subsequent and independent cause of action which arises from the concealment of the fraud. Such a separate cause of action arises, as their Lordships have already said, only out of the conduct of a person who is held to have been responsible for the fraud and has in breach of his duty concealed it. Such cases are very different from what Lord Eldon was dealing with in *Huguenin* v. *Baseley* (1), where, in applying the exclusive jurisdiction of the Court of Chancery to decree restitution of property affected by a fiduciary obligation, he quotes with approval an expression of Wilmot C.J. defining the only doctrine he was himself affirming : " Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it."

(1) (1807) 14 Ves. 273, 289.

In the result their Lordships think that the respondents were not entitled to recover from the appellants more than the amounts of the two later cheques with interest at the usual rate until the date of the action, and from that date at the rate of 9 per cent. until October 2, 1914 (the date of the decree of the District Court), and interest on the aggregate sum at the rate of 9 per cent. until payment, less the sum of Rs.3804.15, being the dividend recovered by the respondents from Williams' estate in the insolvency proceedings, as on the date when it was actually received by the respondents. The District Judge made no order as to costs, and on this point his judgment should be restored. The respondents succeeded rightly, to a limited extent, in the Supreme Court, and the appellants have succeeded to a substantial extent in this appeal. Their Lordships think that justice will be done if they leave the respondents entitled to the costs of the appeal to the Supreme Court, which the judgment of that Court gave them, but order them to pay the appellants' costs of the present appeal. The costs of an application to postpone the hearing of the appeal, which were ordered to be borne by the appellants in any event, will be set off against the latter costs.

They will humbly advise His Majesty in accordance with this opinion.

Solicitors for appellants: *Sidney Smith, Son & Leefe.*

Solicitors for respondents: *Simpson, Cullingford, Partington & Holland.*

[PRIVY COUNCIL.]

J. C.*
1918
March 15.

THE PROTON.

ON APPEAL FROM THE PRIZE COURT, EGYPT.

Prize Court—Vessel—Neutral Flag—Ownership—Declaration of London, art. 57—Order in Council, October 29, 1914.

By art. 57 of the Declaration of London, "subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly." The Declaration of London was adopted by an Order in Council of October 29, 1914, subject to modifications which did not affect art. 57.

In May, 1915, a vessel on the Greek register and entitled to fly the Greek flag was seized and was claimed by her registered owner, a naturalized Greek subject. The Prize Court in Egypt in February, 1916, condemned the vessel, finding that the claimant was not the owner, but that the vessel was owned and controlled by the German Government. The claimant appealed:—

Held, that the Order in Council of October 29, 1914, so far as it adopted art. 57 of the Declaration of London, was not binding upon the Prize Court under the rule in *The Zamora* [1916] 2 A. C. 77, since it prescribed and altered the law to be administered in a Prize Court by confining the test of neutral or enemy character to a single circumstance; further, that a waiver of the Crown's belligerent rights could not be inferred from the terms of the Order, especially in a case of fraud; that therefore the true facts as to the ownership had to be inquired into; and that, upon the evidence, without casting any doubt upon the further findings of the Prize Court, the appellant was not the owner and consequently could not maintain the appeal.

APPEAL from a decree of His Majesty's Supreme Court for Egypt (in Prize).

The appellants, who claimed to be the master and owner of the steamship *Proton*, a vessel entitled to fly the Greek flag, appealed against a decree dated February 8, 1916, whereby that vessel was condemned.

The facts appear from the judgment of their Lordships.

Cator J., the trial judge, held that, assuming that the Declaration

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR SAMUEL EVANS.

of London applied, the facts brought the vessel within art. 46 (ii.) and (iii.) (1), and that she was therefore liable to condemnation, notwithstanding art. 57. On the other hand if the Order in Council of October 20, 1915 (2), whereby the adoption of art. 57 was withdrawn, applied (as he thought it did), he held upon the authorities that he was entitled to inquire into the real ownership, and that, as the real owner was an enemy fraudulently sheltering under the neutral flag, the vessel was liable to condemnation.

1918. *Balloch*, for the appellants. The vessel was entitled to fly the Greek flag; her neutral or enemy character was by virtue of the Order in Council of October 29, 1914, and art. 57 of the Declaration of London, to be determined solely by the flag. The Order in Council of October 20, 1915, cannot be given a retrospective effect so as to deprive neutrals of the waiver of the Crown rights effected by the earlier Order. But in any case the evidence established that the appellant Kouremetis had bought, and was the owner of, the vessel; it was not established that the German Government were the owners, nor that they had the exclusive use or control of the vessel so as to render art. 46 of the Declaration applicable.

Sir Gordon Hewart, *S.-G.*, and *Raeburn*, for the respondent, His Majesty's Procurator in Egypt. The adoption of art. 57 did not preclude the Prize Court from going behind the neutral flag if the facts showed, as they did in this case, that the assumption of the flag was a mere sham. The Order in Council of October 29, 1914, recited that it was made "to minimize so far as possible the interference with innocent neutral trade." The proved facts rendered the vessel liable to condemnation under art. 46 of the Declaration. Further, ownership is a continuing state, and therefore the Order in Council of October 20, 1915 (2), was applicable to the case when

(1) Art. 46 declares that a neutral vessel "will be condemned . . . . (ii.) if she is under the orders or control of an agent placed on board by the enemy Government, (iii.) if she is in the exclusive employment of the enemy Government . . . ."

(2) The Order in Council of October 20, 1915 (R. S. O. No. 1019), provided: "from and after this date art. 57 of the Declaration of London shall cease to be adopted and put in force. In lieu of such article British Prize Courts shall apply the rules and principles formerly observed in such Courts."

J. C. 1918 THE PROTON.

the vessel was before the Prize Court, and art. 57 was inapplicable. The effect of the authorities is that by international law a vessel cannot claim the application of rule of the flag in its own favour if the ship is really of enemy ownership: Story on Prize Courts, pp. 61, 62; Wheaton (Dana's ed.), p. 425, n.

Balloch replied.

March 15. The judgment of their Lordships was delivered by

LORD SUMNER. On February 8, 1916, the steamship *Proton* was condemned in prize. The present appeal is brought by George Kotsovillis, master, and Michael Kouremetis, claiming as owner of the ship. The former only represents the title of Kouremetis, his employer. He has no independent right of his own.

The *Proton* was on the Greek register and flew the Greek flag, nor is there anything in the evidence to show that she was not entitled to do so. The ground of condemnation was that, in truth, she belonged to the German Government. The appellants contend that her flag is conclusive to the contrary. They rely on chapter VI. of the Declaration of London, which deals with enemy character, and by art. 57 provides: "Subject to the provisions respecting transfer to another flag" (which do not apply here), "the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly." It is not necessary to consider on the present occasion whether this provision would in any case apply if the use of the neutral flag were only part of a fraudulent design to defeat belligerent rights.

Their Lordships held in *The Zamora* (1) that while the Crown cannot by Order in Council prescribe or alter the law to be administered by a Court of Prize, the Court would act on Orders in Council in every case in which they amount to a mitigation of the Crown's rights in favour of the enemy or neutral, as the case may be. The Declaration of London Order in Council, No. 2, 1914 (2), which declared that the provisions of the Declaration of London should be adopted and put in force, was in force at the material time in this case. Does, then, art. 57 prescribe the law to be administered by a Court of Prize, or does it direct that the rights of the Crown are

(1) [1916] 2 A. C. 77, 96, 97. (2) Dated October 29, 1914.

to be mitigated in favour of a neutral or of the enemy? In their Lordships' opinion the former is the effect of the article. It declares that a Court of Prize shall determine the character of a vessel alleged to be of enemy character by one single circumstance, the character of the flag which she is entitled to fly, and not by the entire body of relevant circumstances, which determine the truth as to that character. This is a positive prescription as to a material part of the law of evidence.

Furthermore, the surrender of the rights of the Crown is a thing not to be inferred from doubtful language or from general considerations, especially in a case of fraud and in a matter so grave as the exercise of sovereign belligerent rights. The terms of this article are little adapted to a waiver of His Majesty's rights in favour of others: they clearly purport to prescribe the law on a topic which has been the subject of many decisions. Their Lordships are of opinion that, notwithstanding the Order in Council, it is their duty, sitting in prize, to consider the facts proved in order to ascertain what the character of the *Proton* really was.

When seized on May 16, 1915, she was loading oats at the Turkish port of Kiuluk in Anatolia, having lately arrived from Calymnos. One "Mihail Kromatis" was entered on the ship's papers as a seaman and was on board purporting to act in that capacity, but he stated to the British officer who searched the vessel that he was really her owner travelling in the vessel to buy goods at one port and sell them at another, and he is now the chief appellant. The ship had left Piræus in ballast on April 22 for Adalia, where he bought, among other things, eggs, chickens, and bullocks, and sailed in her with them for Samos and Piræus. It is suggested that he was entered in the ship's papers as a seaman because there was no other capacity in which he could be entered, but this is mere guesswork. He came to Alexandria, presumably in the vessel, but did not think fit to remain for the trial or to give evidence on oath.

The master, however, gave evidence on his behalf. He swore that on the passage from Adalia, the weather being rough, some of the bullocks became seasick, whereupon it was decided to land them and the other cargo at the island of Calymnos. This was how the vessel came to be loading at Kiuluk. This story the learned judge did not believe, nor were their Lordships invited to give it credence.

J. C. 1918

THE PROTON.

It was admitted that the *Proton* had been taken into Calymnos in order to pick up and run a cargo of contraband—namely, fuel oil in tins—into the Turkish port of Budroum, only a few hours away on the mainland. This enterprise, however, was forestalled. No doubt this is true so far as it goes, but there is a good deal more in her manœuvres than this.

Calmynos was the birthplace of M. Michael Kouremetis, and the day after his arrival in the *Proton* there arrived the steamship *Vasilefs Constantinos*, laden with fuel oil consigned to his uncle, who was a tailor. M. Kouremetis promptly boarded her and tried hard to induce the captain to take the cargo of oil on to Budroum, but without success. He then tried to get it transferred to the *Proton*, but the ship's agent insisted that the oil must be landed. When this had been done the Italian authorities, who were in occupation of the island, declined to let it go again. They suspected an attempt to supply this fuel to the Turks. Its quantity alone made it an unsuitable cargo for consignment to so small an island.

Who then was M. Michael Kouremetis? Of Greek race and a Calymniote born, and therefore an Ottoman subject, for fourteen years or more he had been in business as a sponge merchant at Hamburg. He says that he prospered there, but there was evidence that about 1913 he failed in business, having quarrelled with and become heavily indebted to his German partner, Herr Emil Stiller. He was then taken into the service of the Deutsche-Tripolitanische Handels-Aktien-Gesellschaft. He further says that, having made a considerable fortune, he proceeded to realize it at the outbreak of war and quitted Germany for home. On April 15, 1915, he obtained a certificate of Greek nationality and became a subject of the King of the Hellenes, and two days later bought the *Proton* for about 160,000 francs. As he was also able about the same time to buy the fuel oil cargo, shipped in the *Vasilefs Constantinos*, and the flour, the corn, and some of the bullocks, shipped in the *Proton* at Adalia, he must have disposed of considerable sums. He says there were further sums, amounting to about 20,000 francs, which he had placed in the hands of two Calymniote merchants, Vouvalis and Manglis, and he claims to have possessed a great deal more money than this, and specifies amounts and to some extent its sources. There was, however, evidence to the contrary given by persons

competent to speak to the facts. The brother of the appellant, Pantilis Kouremetis, could not say whether he was a poor man or a millionaire; but Aristotelis Manglis, a merchant of Calymnos, swore that Michael Kouremetis came home from Germany in the autumn of 1914 practically penniless, and in April, 1915, was well provided with funds, and he appears to be quite innocent of any knowledge that he held 10,500 francs on deposit from M. Michael Kouremetis. Nicolas Vouvalis, too, is equally unaware of the deposit alleged to have been made with him. According to Dimitri Michael Maroulakis, of Calymnos, M. Michael Kouremetis told him that he was supplied with funds from the Turkish and German Embassies, had paid 24,000 francs to the Mutessarif of Adalia (which seems a large sum for mere baksheesh on the shipment of flour and bullocks), and was in the habit of frequently calling at the German Embassy in Athens.

All these facts are deposed to in affidavits, or, in the case of Vouvalis, are stated in a letter, which, as it appears without objection in the record, their Lordships take to have been admitted in evidence by consent. It is true that the affidavits contain many other statements which are not evidence and are not trustworthy. They revel in rumours, they abound in hearsay, they contain many exaggerations and some extravagancies, and after all they are affidavits. Still the learned judge was vigilantly on his guard against such parts of them as were inadmissible; he was well qualified to appraise them at their true value, and in the result he accepted them. On the other hand, the appellant gave no evidence on oath. A letter which he wrote to the Minister for Foreign Affairs of the Hellenic Government was allowed to be read in evidence and probably would have been of no greater weight, if formally attested, but the learned judge did not believe it. Numerous and precise statements are to be found in it as to the appellant's ample means, every one of which could have been readily and cogently confirmed by documentary evidence, which he must either have had in his possession or might easily have obtained. No such documents are forthcoming, and M. Kouremetis must accept the consequences, which, as has so often been pointed out in Courts of Prize, attend on those who advance claims, but withhold the evidence which, if their claims were just, candour and self-interest would alike have impelled them to give.

The learned judge disbelieved the appellants' case, and on the

J. C. 1918 THE PROTON.

evidence found (1.) that M. Kouremetis had not means of his own with which to buy the *Proton;* did not buy her and was not her owner; and only figured as her owner in order that she might continue to fly the Greek flag as a convenient but dishonest device; (2.) that, in view of his enemy associations, he must have bought her with German money; (3.) that only the German Government could have been concerned in laying out so much money on the ship in order forthwith to hazard her in so dubious and dangerous an adventure; (4.) that, as M. Kouremetis was no seaman, he could only have been on board to look after the interests of the German Government, his employers. If the learned judge's first finding is right, this appeal fails, for M. Kouremetis has no character except that of owner in which he can claim to have the ship released to him, and, if not her owner, has no locus standi to criticize or complain of her condemnation. Their Lordships do not wish to be understood as casting any doubt on the other findings, but it is not necessary that they should express any opinion about them. It is enough to say that, in their opinion, the finding that the *Proton* did not belong to the appellant, and that his purported ownership was a mere blind to enable a German ship to conceal her character by continuing to fly the Greek flag as before, was well warranted by the evidence.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Botterell & Roche.*
Solicitor for respondent: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.*
1918
March 15.

YANGTSZE INSURANCE ASSOCIATION, LIMITED . . . . . } APPELLANTS;

AND

LUKMANJEE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Insurance (Marine)—Goods—Sale ex Ship—Payment against Documents—Craft Risk—Policy effected by Sellers—Buyer's Interest not covered—Intention.

The respondent, who carried on business at Colombo, bought teak logs to be shipped at a price "ex ship, payment against documents." The sellers shipped from Bangkok to Colombo 382 logs, of which 144 were in part fulfilment of their contract with the respondent, and informed him of the shipment. The sellers insured the whole 382 logs with the appellants for the voyage and to cover craft and raft risk. The policy identified the parcels of logs by their marks, and was expressed, in the usual form, to be made for all persons to whom the goods should appertain in part or in all. The respondent, having paid the price, took delivery of the logs ex ship, but, while they were still afloat in the form of rafts, a large part were driven out to sea by a gale and lost. The respondent sued the appellants upon the policy:—

Held, that there was no evidence that the policy was effected on behalf of the respondent, or to cover his interest; and that consequently he could not maintain the suit.

APPEAL from a judgment of the Supreme Court of Ceylon (September 6, 1916) affirming a judgment of the District Court of Colombo.

The respondent sued the appellants to recover a partial loss under a policy of marine insurance issued by the appellants upon 144 teak logs shipped from Bangkok to Colombo. The question upon the appeal was whether the policy was effected on behalf of the respondent or to cover his interest.

The District Judge made a decree for the amount claimed, and that decision was affirmed by the Supreme Court.

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, and SIR ARTHUR CHANNELL.

J. C. 1918

YANGTSZE INSURANCE ASSOCIATION v. LUKMANJEE.

1918. Feb. 4. *R. A. Wright, K.C.*, and *Stuart Bevan*, for the appellants. The respondent must show that the policy was intended to be effected either for his benefit, or to cover his interest in the teak: *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.* (1) If it was not so intended the respondent cannot take the benefit of it: *Keighley, Maxsted & Co.* v. *Durant* (2); *Byas* v. *Miller.* (3) There was no evidence to establish that intention. There was no obligation upon the sellers under the contract to tender a policy. It was necessary for the sellers to insure the craft risk upon their own behalf in case delivery should be refused by the respondent: *North of England Pure Oil-Cake Co.* v. *Archangel Maritime Insurance Co.* (4)

MacKinnon, K.C., and *Douglas Hogg, K.C.*, for the respondent. The insurance was in terms effected for every person to whom the logs might appertain; the respondent was one of those persons. The logs were unconditionally appropriated to the contract by the sellers with the assent of the respondent, if not upon shipment, at any rate by the sellers' letter of November 17, 1913, informing the respondent of the shipment; the logs were thereafter at the risk of the respondent. The contract providing for payment against documents, the respondent had a right to have a policy tendered to cover such part of the transit as was at his risk. In any case, inasmuch as delivery was to be taken ex ship, it must be inferred that the insurance of the craft risk was intended to cover the respondent's risk after taking delivery until landed. [Reference was made to *Tregelles* v. *Sewell* (5) and *Polenghi Brothers* v. *Dried Milk Co.* (6)]

March 15. The judgment of their Lordships was delivered by

LORD SUMNER. In this case Mr. Adamjee Lukmanjee sued upon a policy of marine insurance to recover a loss in respect of 144 logs of teak-wood, which, after being discharged overside ex steamship *Hild* at Colombo, were lost in a gale while still in raft. He succeeded, though on somewhat different grounds, both in the District Court of

(1) [1906] A. C. 336.
(2) [1901] A. C. 240.
(3) (1897) 3 Com. Cas. 39.
(4) (1875) L. R. 10 Q. B. 249.
(5) (1862) 7 H. & N. 574.
(6) (1904) 10 Com. Cas. 42.

Colombo and in the Supreme Court of Ceylon. The insurance company now appeals.

The policy was effected at their own expense by the Bombay, Burmah Trading Corporation, Limited, "as well in his or their own name as for and in the name and names of all and every person or persons, to whom the same doth, may, or shall appertain in part or in all," following the company's usual form of policy, and under these words Mr. Lukmanjee claims to have been assured under the policy from the beginning, and entitled to sue as a party to it, subject to his having an insurable interest at the time of loss. There is no question here of any assignment of the policy. In fact he had such an interest; for the logs, when lost, were his, so the question is whether he was a party insured under this policy in respect of that interest, or, in other words, whether the Bombay, Burmah Trading Corporation effected it in any measure on his behalf.

The Bombay, Burmah Trading Corporation, by its agents at Colombo, had sold to Mr. Lukmanjee, who was also at Colombo, "200 tons of Indian first-class teak squares at Rs.175 per ton ex ship. Shipment November-December at the rate of 100 tons monthly. . . . . Payment cash against documents." The 144 logs constituted the first instalment under this contract, and it is common ground that when they were discharged ex ship into the water they had been paid for and had become the property of the respondent.

Except in so far as it can be inferred from the transaction itself and the documents by which it was effected and carried out, there is no evidence to show with what intention the Bombay, Burmah Trading Corporation effected the insurance, nor was there any evidence of any course of business or of any customary understanding of any of the terms employed. What is significant about the policy itself is that it covered 382 pieces of teak, all particularly marked, of which only 144 were for Mr. Lukmanjee and the remainder were for the account of the Bombay, Burmah Trading Corporation. There was a separate bill of lading made out to the order of the shippers, the Bombay, Burmah Trading Corporation, for the 144 logs, and in it they were identified by the same marks as in the policy. Among the marginal clauses in the policy was one covering the ancillary risk between ship and shore, namely, "all risk of craft

J. C. 1918

YANGTSZE INSURANCE ASSOCIATION v. LUKMANJEE.

and/or raft from land to land," but it was admitted that such a clause would be included almost as a matter of course, and that, although it was only under this clause that Mr. Lukmanjee could recover, the fact of its insertion in the policy threw little or no light on the question whether the policy was effected on his behalf as one of the original assured.

The trial judge was of opinion that the property in the goods passed to the buyer before shipment, and that in shipping them the sellers had acted as his agents. Hence he inferred that the insurance was effected for him. The Supreme Court apparently treated the contract as if it contained an implied obligation on the seller's part to insure the buyer in respect of such contingent interest in the goods as he might have while they were at sea. Neither view was, or indeed could be, sustained on appeal, nor had the attention of either Court been directed to the true question, whether the evidence showed that the insurance was effected on the buyer's behalf.

It is clear that the policy itself evidences no such intention. The sellers, and the sellers alone, were throughout interested in the major part of the cargo. Even as to the 144 logs, until the ship arrived and came to deliver overside they, and they alone, had the interest properly describable by the words used in the policy, namely, "upon goods." If the buyer were to fail to pay for the timber in accordance with the contract, their interest in it would continue after discharge overside, for it would remain their property. Even if these logs were paid for against documents, as was the case, the inclusion in the policy of cover against raft and craft risk was necessary as to the residue, and was of no significance in the present connection.

Two suggestions were made in argument; one was that "against documents" means in the language of commerce against a policy of insurance and sundry other documents; the other, that an obligation, binding the sellers to insure on the buyer's behalf, might be inferred because the effect of the contract was to require payment not merely against goods delivered ex ship in a state corresponding to the contract description, but also against documents representing the goods, even though, through sea perils, they were no longer in a state corresponding to the contract description.

The first point fails because there is no evidence to show that the word "documents" in such a connection includes a policy of

insurance. A contract of sale, at a price c. f. and i., is so well understood that no proof is needed that one of the documents which it contemplates is a policy. It may be that, detached from any context, the mere expression "shipping documents" would suggest that one of them is a policy. When, however, the expression is found in a contract, and there is nothing but the language of the contract to determine its meaning, it must be construed as meaning such documents as are appropriate to the contract. In the case of a sale "ex ship," the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery and has reached a place therein, which is usual for the delivery of goods of the kind in question. The seller has therefore to pay the freight, or otherwise to release the shipowner's lien and to furnish the buyer with an effectual direction to the ship to deliver. Till this is done the buyer is not bound to pay for the goods. Till this is done he may have an insurable interest in profits, but none that can correctly be described as an interest "upon goods," nor any interest which the seller, as seller, is bound to insure for him. If the seller insures, he does so for his own purposes and of his own motion.

Again, the mere documents do not take the place of the goods under such a contract. They are not the subject-matter of the sale. If an indorsed bill of lading is delivered to the buyer it is given as a delivery order and not with any intention of making him a party liable upon it, or of vesting him with the property in the goods by the mere delivery of the document. As the goods are not at the buyer's risk during the voyage, there is nothing from which to infer an obligation on the seller, and therefore an intention on his part, to effect an insurance on the buyer's behalf.

It was said that "cash against documents," first of all, implied some document other than a delivery order because of the use of the plural, and, secondly, must have reference to the risks of the voyage so as to make the contract analogous to a c. f. and i. sale, since if "documents" only meant "delivery of the goods" this would be implied by law. The answer seems to be, on the first point, that the plural "documents" would be satisfied either by two delivery orders, one for each shipment, or by two documents, a delivery order and a receipt for the freight, in the case of each shipment. On the second point there is nothing surprising if such a contract is

J. C. 1918

YANGTSZE INSURANCE ASSOCIATION v. LUKMANJEE.

found to express something which the law would imply, and certainly there is nothing in it to compel a Court to give simple and well-known words a meaning which does not belong to them, and which does belong to other words or letters equally well known though not so simple. In truth, however, "cash against documents" does carry the matter beyond "cash on delivery," that is, delivery of the goods, for it imports a convenient mercantile way of effecting the same object without the inconvenience of a payment at or contemporaneous with the discharge overside. It was admitted that payment could not be demanded, even "against documents," till the ship had arrived with the goods. The provision enables payment to be made in a counting-house and in the ordinary course of business, without reference to the precise stage which the process of tumbling the logs into the water may happen to have reached.

Their Lordships are therefore of opinion that there was no evidence on which it could be found that the policy was effected on behalf of the respondent, or to cover his interest in the goods, and that he could not sue on it. They will therefore humbly advise His Majesty that the appeal should be allowed, and that both judgments should be set aside with costs here and below.

Solicitors for appellants: *Walton & Co.*
Solicitors for respondent: *Stephenson, Harwood & Co.*

[PRIVY COUNCIL.]

MINISTER OF RAILWAYS AND HARBOURS OF THE UNION OF SOUTH AFRICA . } APPELLANT;

AND

SIMMER AND JACK PROPRIETARY MINES, LIMITED . . . . . } RESPONDENTS.

J. C.*
1918
April 23.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AFRICA.

South Africa—Mining Rights—Expropriation—Undermining Railway—Notice to support—Construction of Regulation—Ultra Vires Regulation—Subsequent Extension of Powers—Gold Law No. 8 of 1885 (Transvaal), art. 59—Resolution of Volksraad, January 8, 1889—Ordinance 54 of 1903, s. 3, sub-s. (a)—Ordinance 31 of 1905, s. 2, sub-s. 1—Mines and Works Regulations, 1909, s. 2.

By Ordinance 54 of 1903 (Transvaal), as amended by Ordinance 31 of 1905, the Lieutenant-Governor was authorized to make regulations for the protection and preservation of the surface of mines and of railways, and for laying down conditions under which such railways may be undermined. The Ordinance of 1905 provided that it and the Ordinance of 1903 were to be read as one. A regulation framed under the above Ordinances provided: "No owner shall in any case carry on any mining operations under or near railways without first having given notice to the Inspector. Where mining operations have already taken place, and where, in the opinion of the Inspector of Mines, it is necessary to protect the surface of a mine, some adequate means of support shall be provided to such extent as the Inspector may direct." Acting under the above regulation, the Inspector of Mines gave the respondents notice requiring them to fill up certain excavations:—

Held, that the Ordinance would not warrant a regulation authorizing the Inspector to order the filling up of excavations made prior to the Ordinance, but that the regulation of 1909 upon its true construction only applied to excavations made after the date of the regulation and was valid.

Held, further, that a regulation which was ultra vires the Ordinance of 1903 did not become valid upon the powers under that Ordinance being extended by the Ordinance of 1905 so as to warrant the subsequent making of a similar regulation.

In 1889 the Executive Council of the Transvaal Republic by a resolution (subsequently confirmed by the Volksraad) expropriated for railway purposes certain lands in which the Government

* *Present:* EARL LOREBURN, LORD SUMNER, and LORD PARMOOR.

J. C.
1918
UNION OF SOUTH AFRICA (MINISTER OF RAILWAYS AND HARBOURS) v. SIMMER AND JACK PROPRIETARY MINES.

had granted mining rights, which under statute were held independently of ownership of the soil. Under the Transvaal Gold Law of 1885 rights could be withdrawn upon payment of compensation; the resolution provided no compensation for the loss of mining rights:—

Held, that, the terms of the resolution being ambiguous, the resolution should be construed as not effecting an expropriation of mining rights since no compensation for them was provided.

Commissioner of Public Works (Cape Colony) v. *Logan* [1903] A. C. 355 followed.

APPEAL from a judgment of the Supreme Court of South Africa, Appellate Division (May 11, 1915), partly affirming and partly reversing a judgment of Bristowe J.

The respondents were engaged in gold mining in lands situated in the Witwatersrand goldfields. They acquired the freehold of the lands in 1886, and in the following year they acquired a mynpacht brief and mining claims granted to their predecessor in title, the mynpacht brief and claims being in force at the date of the action.

In 1911 the Inspector of Mines, purporting to act under the Mines and Works Regulation, 1909, required the respondents to protect a railway which had been constructed over their property by providing means of support detailed in an accompanying plan. The respondents denied their liability save as to a small part of the requirements. The work having subsequently been carried out by arrangement, the appellant brought an action in the Supreme Court (Witwatersrand Local Division) claiming a declaration that the respondents should bear the cost of packing and filling in certain specified parts of their mines.

The facts, so far as they are material to the present report, and the relevant enactments and regulations appear from the judgment of their Lordships. The pleadings are set out in the South African Law Reports at 1915, A. D. 368.

The trial judge, Bristowe J., having made a declaration as to part of the work in question, the Appellate Division allowed an appeal by the present respondents, and dismissed a cross-appeal by the present appellant.

The learned judges (Rose-Innes C.J., Solomon J.A., and De Villiers A.J.A.) held, shortly, as follows: (1.) (De Villiers A.J.A. dissenting) that the resolution of the Executive Council of January 8,

1889, did not effect an expropriation of the respondents' mining rights; (2.) that a regulation of 1903, so far as it authorized the respondents receiving leave to make certain of the excavations in question, was ultra vires Ordinance 54 of 1903, but that it subsequently became valid, without repromulgation, upon that Ordinance being amended by Ordinance 31 of 1905; (3.) that s. 2 of the Mines and Works Regulations of 1909, so far as it authorized a notice requiring the respondents to fill up at their own cost excavations made prior to the date of the regulations, was ultra vires Ordinance 54 of 1903, s. 3, sub-s. (*a*), as amended by Ordinance 31 of 1905, s. 2, sub-s. 1, under which it was framed. Upon head (1.) the judgment of Bristowe J. was reversed, and upon head (3.) it was affirmed.

1918. Feb. 7, 8, 11. *P. O. Lawrence, K.C.*, and *C. E. Nixon* (*Sheldon* with them), for the appellant. The effect of the resolution of January 8, 1898, confirmed by the Volksraad, was to expropriate the respondents' mining rights in the ground to which it referred. The terms of clauses 1 and 2 cover mining rights, and the preamble makes it clear that they were intended to be covered. The generality of the language is not restricted by the reference to art. 59 of the Transvaal Gold Law, 1885, and the fact that no compensation for mining rights was given. It was the policy of the resolution of the Volksraad in 1889 not to give compensation for mining rights but only for manual work actually carried out, whatever may have been the policy in 1885. Until the enactment of s. 21 of the Gold Law of 1892 there was no right to undermine a railway. The respondents' rights being expropriated, it was not competent to the Government Mining Engineer in 1905 to give the respondents a licence to undermine. In any case, that licence was invalid. It was given under the Mines and Works Regulations, 1903, s. 2, but that section, so far as it purported to authorize the permission, was clearly ultra vires Ordinance 54 of 1903, s. 3, sub-s. (*a*), and it was not validated without fresh promulgation upon the powers being extended by Ordinance 31 of 1905, s. 2, sub-s. 1. Upon the true construction of Ordinance 54 of 1903, s. 3, sub-s. (*a*), as amended by Ordinance 31 of 1905, s. 2, sub-s. 1, and the Regulations of 1909 made thereunder, the Inspector of Mines had authority to

J. C. 1918

UNION OF SOUTH AFRICA (MINISTER OF RAILWAYS AND HARBOURS) v. SIMMER AND JACK PROPRIETARY MINES.

require support to be given to the railway by the filling in of excavations, whether they had been made before or after the date of the regulation. The regulation in terms refers to cases "where mining operations have already taken place." The object of the Ordinance of 1905 was to protect railways from the risk of subsidence arising from mining operations. That risk arose equally from operations carried out before the framing of a regulation as from operations thereafter to be undertaken. [Reference was made, as to the expropriation, to *Central South African Railways* v. *Geldenhuis Gold Mining Co.* (1)]

Upjohn, K.C., and *Strode*, for the respondents. The Regulation of 1909, upon its true construction, did not authorize the Inspector of Mines to require the respondents to fill up excavations made before the regulation was made. The regulation throughout deals with the conduct and management of a mine as a going concern. The reference to mining operations which "have already taken place" is to operations taking place after the date of the regulation but before the notice by the Inspector. If there is an ambiguity as to the meaning of the regulation it should receive that construction which does not give it a retrospective effect: *Midland Railway* v. *Pye* (2); *Pardo* v. *Bingham* (3); *Young* v. *Adams*. (4) If the regulation has the wider effect contended for it was not warranted by the Ordinances of 1903 and 1905. The resolution of the Executive Council in 1889 did not effect an expropriation of the respondents' mining rights, which were enjoyed entirely independently of the freehold. At that date all precious metals vested in the State; the respondents' rights were not property in the land but a jus in alieno solo: *Neebe* v. *Registrar of Mining Rights* (5); Gold Law No. 1 of 1883, art. 2; Gold Law No. 8 of 1885, art. 1. There was in 1889 no right to expropriate mining rights without compensation: Appx. to Gold Law, 1883, art. 16; Gold Law, 1885, arts. 59, 90. The resolution should be given that construction which does not effect an expropriation without compensation: *Commissioner of Public Works* (*Cape Colony*) v. *Logan*. (6)

(1) 1907, Witwatersrand H. C. Rep. (T.H.) 270.
(2) (1861) 10 C. B. (N.S.) 179.
(3) (1869) L. R. 4 Ch. 735, 739.
(4) [1898] A. C. 469.
(5) 1902, Transvaal L. R. (T.S.) 65.
(6) [1903] A. C. 355.

If there was an expropriation the Government by subsequent licences regranted the rights.

P. O. Lawrence, K.C., in reply. The point as to a regrant has not previously been taken, and cannot be taken now.

April 23. The judgment of their Lordships was delivered by

LORD SUMNER. The first question in this appeal concerns the validity and effect of regulation No. 2 of the Mines and Works Regulations, 1909. The Ordinances under which this regulation was made were two, the Mines, Works and Machinery Regulations Ordinance, 1903 (No. 54 of 1903), and the Mines, Works and Machinery Regulations (Amendment) Ordinance, 1905 (No. 31 of 1905). The latter amended the former, and is to be read as one with it. So reading them, and omitting immaterial and unimportant words, the enactment may in effect and for present purposes be stated as follows: "The supervision of all mines and works and machinery shall be exercised by the Government Mining Engineer, the inspectors of mines, the inspectors of machinery, and other officers appointed by the Government in that behalf. It shall be lawful for the Lieutenant-Governor to make regulations in respect of mines (including all excavations for the purpose of winning minerals, whether abandoned or actually being worked, on the surface and underground) for the protection and preservation of the surface of mines and works and of railways, and for laying down conditions under which such railways may be undermined." It should be added that all the other powers conferred on the Lieutenant-Governor under these Ordinances seem to contemplate that the subject-matter of his regulations shall be concerns which are under active management, and, as such, require that their operations should be regulated by authority.

The cavities which have been filled with sand and are the subject of the present litigation are excavations underground, made for the purpose of winning minerals before the passing of either Ordinance, and then abandoned. Many of them undermine the railway in question. Till recently they were believed by the Government officers concerned not to endanger the protection or preservation of the railway, and, although a different opinion is now entertained, this rests on apprehension or caution, and not on any actual damage

J. C. 1918

UNION OF SOUTH AFRICA (MINISTER OF RAILWAYS AND HARBOURS) v. SIMMER AND JACK PROPRIETARY MINES.

done or sign of the likelihood of damage. A large part of them was legal when made. These cavities are not themselves a mine, but form a part of the mine, which belongs to the respondents.

If the regulations now in question have the effect for which the appellant contends, they authorize the Inspector of Mines to require the respondents to fill up these cavities at their own expense, because in his opinion it is necessary to protect the surface of the Simmer and Jack Mines at and near the place where the railway runs. Is a regulation, which has such an effect, pro tanto within the authority of the powers above stated ?

If it is, this regulation is the one instance among the powers above stated, in which the subject-matter is not a concern under active management and a site of current operations, but at most is within the ambit of such a concern, and is the abandoned site of operations long spent and brought to an end. Under the principal law the regulation could not have been made, since the protection of railways was beyond its purview, and the very section of the amending law which extends it to railways at all provides for the first time for the prescription of conditions under which a railway might thereafter be undermined. This in the case of this railway had already been done long before by these excavations or parts of them.

In the opinion of their Lordships, it is not a legitimate interpretation of mere amending provisions to hold that they completely alter the character of the principal law, unless clear language is found indicating such an intention. The amending words, wide as they are, do not evince any intention to make so radical a change as would be involved if there were thrust into powers to regulate future operations a solitary power to order a mine owner to undo the result of a past operation, long completed, which, when it took place, involved no breach of the law and lay within the rights of those who carried it out. Adequate effect can be given to the words in question, consistently with the general prospective scope of the Ordinance, by holding that the Lieutenant-Governor is authorized in respect of abandoned excavations to make regulations for the protection and preservation of railways against future operations which may so affect those excavations as to endanger the railways.

In the Courts below attention appears to have been principally directed to the effect and scope of the Ordinances, and it was assumed, with little scrutiny, that the language of the regulations would truly bear the meaning which the appellant puts upon them. Their Lordships think that before these regulations are condemned as ultra vires it is proper to examine them more closely, to see whether they cannot justly be construed so as to keep them strictly within the Lieutenant-Governor's power.

The regulations in question consist of sub-ss. 2 and 3 of s. 2 of the Mines and Works Regulations of 1903, for sub-s. 2 of which an enlarged and altered sub-section was substituted by the amended Regulations of 1909.

When consolidated, and omitting words not essential to the present purpose, they would run as follows: "2. Whenever, in the opinion of the Inspector of Mines, it may be necessary to protect the surface of a mine or to protect railways situated thereon, it shall be lawful for such Inspector to prohibit the owner from mining in any portion of such mine, save under such restrictions as such Inspector may determine. No owner shall in any case carry on any mining operations under or near railways without first having given notice to the Inspector. Where mining operations have already taken place, and where, in the opinion of the Inspector of Mines, it is necessary to protect the surface of a mine, some adequate means of support shall be provided of such extent as the Inspector may direct. 3. All excavations made contrary to the provisions of the preceding regulation shall be immediately filled up by the person responsible for such excavations."

It will be noticed here that the principal provision is that the Inspector may in certain cases prohibit future mining in any part of the mine, either absolutely or sub modo. Next, passing from this, "mining operations," not throughout the mine and in any part of it, but under railways particularly, are dealt with. Here the owner before operating must first give notice, and if, contrary to this provision, mining operations have already taken place, scilicet before the Inspector is made aware of them or of the intention to carry them out and on getting to know of them he thinks that the surface of the mine must be protected, the regulation itself imperatively requires adequate means of support to be pro-

J. C.
1918
UNION OF SOUTH AFRICA (MINISTER OF RAILWAYS AND HARBOURS) v. SIMMER AND JACK PROPRIETARY MINES.

vided, thus taking the matter out of the Inspector's hands, except as to the extent of the remedy so provided.

Thus read, the words about mining operations, like the provisions about mining, refer to things to be done after the date of the regulation. The case for prohibition is clearly prospective, and so is the provision for giving notice before undermining a railway, and the mining operations, which "have already taken place," being in antithesis to the notice to be given before they take place, must equally be prospective.

It is said that to read the words "where mining operations have already taken place" as merely providing the remedy for non-compliance with the previous requirement of prior notice to the Inspector leaves art. 3 without operation, and that a construction which provides a remedy twice over for the same thing is illegitimate. Their Lordships think that the above construction is not truly liable to this stricture. First of all, abundant effect is given to art. 3 by applying it to infractions of the first and principal part of art. 2, which otherwise would be provided for only by penal provisions in personam, without providing for the equally necessary restitutio in integrum required for the safety of the railway. Secondly, it provides for the immediate filling up of an unauthorized excavation, which is something distinct from and more special than "provision of adequate means of support." Thirdly, in art. 3 it is the person responsible for such excavations who has to fill them up. If, however, art. 2 were read as applicable to excavations anterior to the regulation itself, changes of ownership might have made it impossible to carry out the directions of the article. On all grounds art. 3 stands clear of the latter part of art. 2, which falls to be construed by itself as a full and self-contained provision for the double case of an intention to undermine a railway notified beforehand and an undermining of a railway subsequently notified and ordered to be supported adequately. Their Lordships are accordingly of opinion that the letter from the acting Inspector of Mines, dated July 20, 1911, which required the respondents to pack the stopes above the seventh level, was not warranted by the regulation under which it purported to be written and was ultra vires.

The appellant further contends that a limited portion of the area in question, which lies vertically below the railway, was

expropriated by the Transvaal Government in 1889. If this is so, he says, the respondents' subsequent workings under the railway in this area were acts of trespass on Government property. In the proceedings, as they stand, no claim has been made for damages for trespass, nor has any evidence of the amount of such damage been given. Indeed, if the effect of the Besluit is to leave the prior "mynpacht" right standing, notwithstanding that it transferred the entire dominium in the soil and not the surface only, trespass would not be the word to use in the case of an irregular exercise of existing rights to mine in this property, nor would the remedy necessarily be the same as that for trespass. From several passages in the judgments, however, there is good reason to think that the proceedings in the Courts below were conducted on the agreed footing that, if on any ground it should be held that any part of the respondents' workings was wrongful, the cost of filling that part with sand should be borne by them, and their Lordships entertain no doubt, after the statements of the respondents' counsel, that if this should prove to be so the respondents will be advised to accept responsibility, if established, independently of any question arising on the form of the proceedings.

The question is one of the true construction of the Raadsbesluit dated January 8, 1889, and approved on May 13 following. By that instrument it was resolved (in the terms of the translation from the Dutch, which has been agreed between the parties): "I. The ground required for the tram line, ... which has been marked and beaconed off so far as possible by beacons and cuttings, ... is hereby entirely withdrawn from the control of the previous owners and all other persons, who hitherto . . . . could exercise any sort of right whatsoever, thereover or thereto. II. From this date the ground referred to in art. I. shall be wholly and unconditionally at the disposal of the same company for the purposes of the contract. IV. The ground referred to in art. I. shall be transferred to the name of the Government."

The actual transfer provided for in art. IV. does not seem to have been made, but the effect of the Besluit does not depend on the performance of this act: *Central South African Railways* v. *Geldenhuis Main Reef Gold Mining Co.* (1) The words used are

(1) Witwatersrand H. C. Rep. 1907, T.H. 270.

J.C.
1918
UNION OF SOUTH AFRICA (MINISTER OF RAILWAYS AND HARBOURS) v. SIMMER AND JACK PROPRIETARY MINES.

wide; indeed, though general in form, they could hardly have been wider. It is common ground that in themselves they are wide enough to vest in the Government the dominium of the solum along which the railway runs. This, however, is not enough. It is not a question of granting the surface with a reservation of the subjacent strata, so that the latter are not conveyed but remain in the former possessors by title of ownership. Mynpacht rights are sui generis and are the creature of statutes, which have conferred on the State the right to dispose of precious metals and invest the State's grantees with the right to win and get them, the ownership rights of the dominium notwithstanding: *Neebe* v. *Registrar of Mining Rights.* (1) Hence words of transfer adequate to cover the general ownership right in the land may or may not also cover any mynpacht rights in the land, which have been already created and are in existence, according to the true intent of the instrument to be gathered from its terms generally. The question is whether the effect of this instrument is to vest in the Government the mynpacht rights therein, and pro tanto to extinguish those rights vested in the respondents' predecessors in title, or to leave those rights standing, as they then stood, vesting in the Government the dominium, but subject to such rights. In the Supreme Court De Villiers A.J.A., agreeing with the trial judge, came to the conclusion that, there being no express words of reservation, the general words did not raise the inference of an intention to make a reservation sufficiently clearly. The majority of the judges in the Supreme Court came to the conclusion that the general language of the instrument, taken in conjunction with the existing law, sufficiently showed that the Besluit was not intended to deal with the mining rights of the respondents' predecessors.

The Ordinances passed from time to time before 1889 to regulate mining on the Witwatersrand and elsewhere, commonly called the Gold Laws, show that the scheme of the legislation was to create or recognize mining rights, exercisable under a system of licence and control, which were not dependent on the possession of full rights of ownership in the ground worked, but were to be reconciled with the concurrent ownership rights of others. By the Mining Law No. 8 of 1885, which was in force in 1889, it was

(1) Transvaal L. R. 1902, T.S. 65.

provided that the right to mine and dispose of all precious metals belonged to the State, the owner of private ground, proclaimed as a public digging, being entitled to share in the proceeds of diggers' licences. Art. 59 provided, "whenever it may be found necessary in the general interest for public purposes, such as for railways . . . . to withdraw, in whole or in part, rights already granted, the Government shall have the right so to do upon payment of compensation." Now, when the Besluit was passed, mining rights in the whole of the ground affected had been already granted to the respondents' predecessors, partly in the form of a "mynpacht brief," partly of diggers' licences, all of which had been duly kept alive. Until the site for the railway was taken there was no reason why, subject to the necessary formalities, these rights should not in due course be exercised and enjoyed in the ground in question. If the language of art. I. of the Besluit be taken in its widest sense, then, if art. 59 of Law No. 8 of 1885 applied, as it would do if nothing was provided to the contrary, the Government would come under a substantial obligation to compensate the owners of the mining rights for their withdrawal, in respect of their prospective value, measured chiefly by anticipated profits.

The Besluit does make provision to the contrary. By art. IV., "any person, who considers himself entitled to compensation by reason of the expropriation of his property or other rights," shall take certain steps, and by art. V., "in estimating the amount of compensation to be paid . . . . (*a*) Compensation shall only be given for direct damage actually sustained, and in no case for loss of profit. . . . . (*c*) No compensation shall be given for expropriating the ground required for the railway lines . . . . but only for the removal, destruction, or damage of or to anything which owes its existence to manual labour."

These provisions are sufficiently plain. There is also a statement in the Besluit that the Executive Council, "considering art. 59 of the law regulating the digging for precious metals, resolves as follows," &c. There has been a difference of opinion as to the sense in which the Executive Council had considered art. 59, whether it was for the purpose of applying it with an expressed limitation, or for the purpose of disregarding it with the substitution of a different scheme of compensation. Their Lordships think

J. C. 1918 — UNION OF SOUTH AFRICA (MINISTER OF RAILWAYS AND HARBOURS) v. SIMMER AND JACK PROPRIETARY MINES.

that the important point is that the Besluit draws attention to the article, and they agree with the majority of the judges in the Supreme Court that there may and should be inferred from the language of the Besluit, taken as a whole, the intention that the mining rights of the respondents' predecessors were not to be interfered with or allowed to become the subject of expropriation. As the law then stood, by art. 21 of the Law of 1885 digging under railways was prohibited, though it is not quite clear that this would extend to deep workings such as those in question, some hundreds of feet below the surface. It was, however, possible, as indeed not long after took place, that the law might be amended by permitting railways to be undermined under sufficient precautions for their safety, and if the Government decided not to expropriate the mining rights, in order to avoid payment of compensation for them, such a policy is intelligible enough. The contrary view would involve the conclusion that, without explanation, the general policy of the Gold Law was abandoned in this instance in the Government's own favour, and that rights already granted, but not yet exercised, were deprived of all effectual compensation for their withdrawal by the device of excluding profits from the scheme of compensation, leaving nothing else to be paid for.

In the *Geldenhuis Case* (1) this aspect of the matter does not appear to have been brought to the attention of the learned judge, Wessels J., and he expressed no opinion upon it. Counsel seemed to have assumed that actual transfer into the name of the Government, in pursuance of art. IV., would put an end to mynpacht rights, previously granted, and placed reliance on the fact that no transfer had taken place. The Besluit itself is admittedly a somewhat artless piece of legislation. If the form of a regular conveyance had been in question, the use of words of the widest generality in describing the subject-matter, without any words of limitation or reservation following immediately afterwards, would be significant to show what the intention was, and inferences from other parts of the instrument or provisions contained in other parts of the scheme would hardly have sufficed to outweigh or modify that generality. The case is different when the question is how a piece of legislation should be construed which does not

(1) Witwatersrand H. C. Rep. 1907, T.H. 270.

profess to have been reduced into an accepted conventional form, and the meaning must be gathered from the instrument as a whole. Furthermore, it is to be recollected that this Raadsbesluit was in substance a special law passed by the Legislature in derogation of the rights of a subject and for the Government's own benefit or for the benefit of a company which it was concerned in promoting, the Nederlandsche Zuid-Africaansche Spoorweg Maatschappij. Under these circumstances their Lordships think that the construction ought to be in favour of the subject, in the sense that general or ambiguous words should not be used to take away legitimate and valuable rights from the subject without compensation, if they are reasonably capable of being construed so as to avoid such a result consistently with the general purpose of the transaction, a canon formulated by Lord Davey in delivering the judgment of this Board as long ago as the case of *Commissioner of Public Works (Cape Colony)* v. *Logan*. (1) They accordingly apply this construction to the Besluit in question, and come to the conclusion that the judgment appealed against was right in deciding that the mining rights in ground vertically under the railway were not expropriated.

It is, however, admitted that, as the mining laws stood, without the permission of the proper authority excavations made vertically under the railway line after the date of the Raadsbesluit, which which was the case in the more limited area in question, could not be justified.

The Engineer's letter of permission, dated July 18, 1905, on which the respondents rely, clearly went beyond any powers which he then possessed. At that date the Executive itself had no power to make general regulations providing for the grant of particular permissions to work under a railway. This defect in its powers was made good by an Ordinance passed in the following September. It amended the prior legislation, which empowered the Lieutenant-Governor to make regulations in respect of the working of mines by extending his powers to the making of regulations for laying down the conditions under which railways might be undermined. This new power was not exercised until 1909, by which time the respondents had completed the workings now in dispute.

(1) [1903] A. C. 355, 363, 364.

J. C.
1918
UNION OF SOUTH AFRICA (MINISTER OF RAILWAYS AND HARBOURS) v. SIMMER AND JACK PROPRIETARY MINES.

It is not a question whether the provisions of the amending Ordinance can be read as incorporated with the principal Ordinance so as to relate back to its date. Even if that be so, the result merely is that under the amended Ordinance the old regulation might have been justified if its terms had applied to mining under railways. The only regulation under which the Engineer's permission could have been, or professed to have been, issued was one which was silent as to railways, and accordingly the permission gave the respondents no valid authority to undermine, because, even if the Lieutenant-Governor be deemed to have had the power to issue a regulation which would have covered the permission, in fact he had not exercised that power.

In their Lordships' opinion it should be declared that the mining rights in the area under the railway, which lies between the green lines on the plan forming part of the record and is coloured pink thereon, were not expropriated in favour of the appellant, but that the ground was excavated by the respondents without proper authority, and that otherwise the appeal should be dismissed with costs. This very limited success ought not to affect the costs of the appeal, especially as the respondents acted on the faith of a Government official's permission, which he ought not to have given.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Cameron, Kemm & Co.*
Solicitors for respondents: *Julius Edwards & Thomas.*

[PRIVY COUNCIL.]

DEMERARA TURF CLUB, LIMITED (IN LIQUIDATION) . . . . . } APPELLANTS;

AND

WIGHT . . . . . RESPONDENT.

J. C.* 1918 April 26.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

Roman-Dutch Law—Auction Sale—Increasing Bids—Roman-Dutch Law not applicable—Conditions of Sale—Right to withdraw Property.

There is no rule of Roman-Dutch law which provides that upon a sale by auction by increasing bids, according to the method usual in England, the bidder is the acceptor of an offer made by the auctioneer; neither is there any rule that the highest bidder can insist that the property shall not be withdrawn.

Upon a sale of land by auction in British Guiana, where Roman-Dutch law governs contracts of sale of immovables, the sale was conducted in the English manner by increasing bids. The conditions of sale, which were read to the bidders by the auctioneer, indicated that the offers would come from the bidders, and that there would be no bargain until an offer had been accepted by the auctioneer. The respondent made the highest bid, but the auctioneer declined to sell the property at the price which he offered. He claimed an order for the transfer of the land to him:—

Held, that the matter was governed by the conditions of sale, and that the auctioneer was not bound to accept the respondent's bid, and that the action accordingly failed.

APPEAL from a judgment of the Supreme Court of British Guiana (April 17, 1916) reversing a judgment of the Chief Justice.

The action was brought by the respondent against the appellants to enforce a contract alleged to have been made on December 4, 1914, for the sale of certain land in British Guiana to the respondent. The question upon the appeal was whether the respondent, as the highest bidder at an auction sale of the land, was entitled to have the property transported and delivered to him, or whether the auctioneer could withdraw the property from sale.

* *Present:* LORD BUCKMASTER, LORD PARMOOR, and SIR WALTER PHILLIMORE, BART.

J. C.
1918
DEMERARA TURF CLUB v. WIGHT.

The facts appear from the judgment of their Lordships.

Major C.J., by whom the action was tried, gave judgment for the appellants. He held that the question had to be determined by Roman-Dutch law, and that, thereunder, there must be an acceptance by the vendor of the bidder's offer in order to establish a consensus. In his view the acceptance requisite consisted of an *addictio*, or assignment, which at an auction was equivalent to the "knocking down" of an article by the auctioneer to the highest bidder. As there had been no acceptance of the respondent's offer, there was not a complete contract of sale.

The judgment was reversed upon appeal. Berkeley J. stated that there appeared to be no judicial decision dealing with the question, but he referred to *De Smidt* v. *Steytler* (1) and *McGowan & Co.* v. *Gomas*. (2) His conclusion upon a consideration of the commentators was expressed in the following passage: "A sale at auction without reserve indicates on the part of the auctioneer an offer, or agreement, or consent, on the part of the auctioneer to sell to the highest bidder, provided he is prepared . . . . to carry out the conditions attached to the sale. In the opinion of Matthaeus (Lib. 1, cap. 10, s. 48) whoever advertises an auction sale tacitly promises that, whoever wins in the bidding, the property shall be knocked down or conveyed (*addictum*) to the winner; for, he says, that is the substance of an auction sale." Hill J. was of opinion that the offer came from the auctioneer and was accepted by each bidder subject to there being no higher bid; he also agreed with the view of Berkeley J. above quoted. The Court further held that the alleged existence of a local custom entitling the auctioneer to withdraw the property had not been proved.

1918. March 14, 15, 21. *P. O. Lawrence, K.C.*, and *Bisschop*, for the appellants. No contractual relation was constituted between the respondent and appellants; the auctioneer had the right to withdraw the property at any time before the fall of the hammer. The view that in Roman-Dutch law every auction sale is without reserve unless the contrary is stated is contrary to the judgment of De Villiers C.J. in *Municipality of Willowmore* v.

(1) (1852) 1 Searle, 137.
(2) 1892, British Guiana Law Reports, 171.

Mathews. (1) The auction in this case was not one to which the rules of Roman-Dutch law as to Dutch sales are applicable. In Holland an auction of immovables by ascending bids, without a descending sale on a subsequent day, was and is unknown. The views of the commentators as to the principles governing auction sales therefore have no application, and the matter depends upon the terms of the conditions of sale. Those conditions did not state that the property would be sold to the highest bidder ; they show clearly that the offers were to come from the bidders. The views expressed by Matthaeus in his De Auctionibus are not applicable here for the above stated reason. But, in any case, the opinion expressed in bk. 1, ch. 10, s. 48, that the vendor is bound to the bidder and cannot withdraw is admitted by the writer to be contrary to the view of Bartolus and Damhouder ; it is also contrary to the opinion of the following Roman-Dutch commentators : Huber, Praelectiones (1689), vol. 2, bk. 8, ch. 2, s. 6 ; Huber, Heedensdagsche Rechts-Geleerdtheyt (1699), vol. 1, bk. 5, ch. 4, ss. 15 to 18, 25, 28 ; B. van Zutphen (1680), p. 138, s. 23 ; J. Munniks, Handleiding (1776), vol. 2, ch. 18, p. 29 ; also to the modern authorities— S. J. Fockema Andreae, Oud-Nederlandsch Burgerlijk Recht (1896), vol. 2, p. 28, and Asser, Nederlandsch Burgerlijk Recht (1905), vol. 3, pt. 1, pp. 305, 306 ; Maasdorp, vol. 3, p. 130. [Reference was also made to Van Leeuwen, bk. 4, ch. 20, s. 7 (Kotze's translation, vol. 2 p. 165) ; Voet (Berwick's translation), bk. 18, ch. 2, s. 4 ; Lybreghts, Practyck van het Notaris Ampt (1741), pp. 105 to 108 ; Van Wassenaer, Judicieele Practyck, vol. 2, p. 96.]

Gore-Browne, K.C., and *A. C. Nesbitt*, for the respondent. The present question is to be determined by the Roman-Dutch law as to voluntary auctions, which is dealt with by Matthaeus : as to his authority see Burge's Colonial and Foreign Law (1907), vol. 1, p. 125 (n.). Under the Roman-Dutch law, unless a right to withdraw is expressly notified, the property cannot be withdrawn ; each bid is an acceptance of an offer by the vendor, subject to there being no higher bid. The passage in Matthaeus, bk. 1, ch. 10, s. 48, is applicable to this case. Both ascending and descending auctions were known to Matthaeus, and he throughout chapter 10 draws a distinction between voluntary and judicial sales. There is through-

(1) (1890) 8 Juta, 20.

J. C. 1918 DEMERARA TURF CLUB v. WIGHT.

out his work no suggestion that upon a voluntary auction an acceptance is requisite to establish a consensus. The commentators cited as opposed to Matthaeus were dealing with judicial sales. [Reference was also made to Voet, lib. 18, tit. 21, ss. 1 and 2.] The view of Matthaeus upon the matter is accepted by modern writers: Nathan's Common Law of South Africa (1904), vol. 2, pp. 718, 720, 722; Colquhoun, Summary, vol. 3, p. 11; Burge (1838 ed.), vol. 2, p. 576. [As illustrating the English law, reference was made to *Bexwell* v. *Christie* (1) and *Green* v. *Baverstock*. (2)]

Bisschop replied.

April 25. The judgment of their Lordships was delivered by

SIR WALTER PHILLIMORE. The plaintiff in this case, the present respondent, brought an action to enforce specific performance of an alleged contract of sale whereby he contended that he became the purchaser of certain real estate in the Colony of British Guiana which was the property of the defendant company.

The Chief Justice of British Guiana, Sir Charles Major, gave judgment for the defendant company, dismissing the action with costs. On appeal the Supreme Court, Berkeley and Hill JJ., reversed the decision of the Chief Justice, and ordered the defendant company to transport and deliver to the plaintiff the property in dispute on payment of the sum of 16,005 dollars and one-half the costs of transport, and ordered the defendant company to pay the plaintiff's costs in both Courts. The company appeals from this decision.

The story is a short one. Some matters were controverted in the evidence; but the facts as found by the Chief Justice, and not disputed in the Court of Appeal or before their Lordships, are as follows: The company was in liquidation, and one Cannon, the liquidator, who was also a licensed auctioneer, obtained leave from the Court to sell the real property of the company, 55 acres of land known as Bel Air Park with the buildings thereon. Cannon was to be the auctioneer, making no charge for his services.

The sale was advertised as a sale at public auction by the liquidator in the grand stand of the club. On the appointed day, December 4,

(1) (1776) 1 Cowp. 395.
(2) (1863) 14 C. B. (N.S.) 204; 32 L. J. (C.P.) 181.

1914, the auctioneer began the proceedings by reading out the conditions of sale, which were as follows :—

" Conditions on which the undersigned will offer for sale at public auction on Friday, the 4th December, 1914, at 1 o'clock P.M., on the premises (in the grand stand), by order of Mr. N. Cannon (as liquidator of the Demerara Turf Club, Limited), 55 acres of land known as Bel Air Park, with all the buildings, erections, fixtures, and fittings thereon :—Article 1 : The purchaser or purchasers shall provide good and sufficient securities to the satisfaction of the auctioneer, who shall sign these conditions of sale along with the said purchaser or purchasers, and shall be bound as they do hereby bind and oblige themselves jointly and severally with such purchaser or purchasers to pay the purchase-money. Article 2 : Payment of the purchase-money shall be paid to the auctioneer as follows : 10 per cent. in cash on the knock of the hammer, and the balance on the passing of the transport. Article 3 : The purchaser or purchasers shall pay to the auctioneer in cash on the knock of the hammer the church and poor money payable on the sale. Article 4 : Possession will be given on the passing of the transport, the cost, including the revenue stamp, to be divided between the seller and the purchaser. Article 5 : Two or more persons bidding at the same time, or any dispute arising, the auctioneer reserves to himself the right of deciding and settling the same in such manner as he may think fit."

A bid of 15,000 dollars was made, and a second bid of 15,005 dollars. Then came a third bid of 16,000 dollars, and then the plaintiff bid 16,005 dollars. No further bid was made. Cannon then said, " I am sorry, gentlemen, but I cannot sell at that price." The plaintiff says that he said, " The Turf Club is mine," using consciously or unconsciously a phrase common at Dutch auctions by way of a descending scale. If he did say so Cannon did not hear him ; and without more being said the company dispersed. There was some correspondence afterwards, and then the plaintiff brought his action on March 23, 1915.

It is to be noted that there was, on the one hand, no intimation either beforehand or at the auction that there was a reserved price, or that the vendor reserved the right to bid ; nor, on the other hand, was there any intimation that the sale was to be without reserve, or that the property would be knocked down to the highest bidder.

J. C.
1918
DEMERARA TURF CLUB v. WIGHT.

In these circumstances their Lordships have to determine what was the nature of the business which was entered upon when this property was put up for sale.

It is contended on behalf of the plaintiff that this matter is concluded by law; that by the Roman-Dutch law which rules, or at the time ruled, in British Guiana, the auctioneer who puts up property for sale thereby makes an offer, that each bidder is an acceptor, that by each bid a provisional contract is made, one liable to be displaced or superseded by a higher bid, but forming unless so displaced or superseded a contract binding on both parties. Alternatively the contention is expressed in this way: that the auctioneer when he puts up property for auction tacitly promises to accept the highest bid, and is bound to accept it, and that his verbal or physical acceptance is a mere formality which he is bound to give. Hill J. apparently decided for the plaintiff on both grounds; Berkeley J. probably on the second only.

It is to be observed that this is not an action for damages for not accepting a bid or for withdrawing the property from sale. It is an action which proceeds upon the assumption that there was a sale. For the plaintiff, therefore, to succeed, either the bidder must be an acceptor, or the auctioneer's acceptance of the last bid must be a mere formality.

It is contended on behalf of the defendant company that there is no settled rule of Roman-Dutch law to the effect asserted by the plaintiff, and no rules of Roman-Dutch law which apply to such auctions as this was, and that in any case, this being a voluntary sale, the auctioneer could make his own arrangements, and that the nature of the business for which he was arranging was sufficiently indicated by the use of the phrase "knock of the hammer" in the second and third of the conditions of sale, which showed that the bidder was to be deemed the offerer and the auctioneer, if he so willed, the acceptor. It is no doubt true that the auctioneer could make his own terms on which he proposed to conduct the sale; but it is also true that if there was a silence as to any term or a doubt what the term was, it is material to know what is the underlying law, or the law which would prevail in the absence of any special term.

Their Lordships therefore proceed to examine whether there is any

rule of Roman-Dutch law applying to auctions of this nature, and if so what its effect is. All the judges in the Courts below seem to have thought that there is a rule of Roman-Dutch law upon this point, but they have differed in their view of its effect. There are no decided cases which can be quoted as authorities and there is no Code, Statute, or Ordinance. The law has to be extracted from the works of writers of authority. These start by referring to the Roman law.

In the Roman law itself, though sales by auction and the letting of tolls by auction were well known, there is no direct guidance to be found. There are references to auctions, but no rules of law, to be found in the Digest. In the Code there are two passages (lib. 10, tit. 3, s. 4 ; lib. 11, tit. 31, s. 1) ; but these relate to necessary or judicial sales, and, moreover, have no bearing on the point in question.

The writers on Roman-Dutch law endeavour to help themselves out by the analogy of the Roman law as to sales by addictio in diem. This analogy is noticed in the judgments of the judges in the Court below ; but, as it was agreed at the Bar before their Lordships, is a misleading analogy. It is unnecessary, as there was this agreement, to explain at length why no assistance can be got from the analogy, and why, indeed, confusion will arise if it is attempted to bring sales by auction under the law as to sales by addictio in diem. The writers on Roman-Dutch law also avail themselves of the writings of commentators of other European nations, such as Bartolus, who was an Italian, and Choppinus, who was a Frenchman from Anjou. How far they can be used as authorities on Roman-Dutch law may be doubted. They, too, found themselves on the law as to sales by addictio in diem.

The authority principally relied upon in the Courts below and before their Lordships is Matthaeus, an author of much learning and repute, and quoted as an authority by later writers who are accepted authorities on Roman-Dutch law. He wrote a treatise on auctions. His book De Auctionibus was published at Utrecht in 1653. His work is founded on the Roman law and the European commentators upon it from Bartolus onwards. He also makes frequent reference to local Ordinances as precedents.

Unfortunately, however, for its value as a guide in the present

J. C. 1918 — DEMERARA TURF CLUB v. WIGHT.

case, the principal scope of the work is to treat of public (so called) or necessary sales; that is, sales made under the authority of a Court of justice, either of confiscated property or of property taken in execution of a civil judgment. Private or voluntary sales are matters of subsidiary treatment only. This is stated on the title page, and in bk. 1, ch. 4, ad finem. And there is another reason. Voluntary sales by auction, using the word "auction" for a sale by increasing bids and "reduction" (as it will be convenient to do) for sales by decreasing bids, were, and apparently still are, unknown in Holland, except as tentative or provisional transactions. Two classes of competitive sales are known in Holland. Necessary sales are in the ordinary form of auction sales, but at the close of the day no contract binding the vendor is created between him and the highest bidder; for all the authorities, including Matthaeus, are agreed that further offers may be, and, indeed, must be, taken till the last moment when the decree of the Court is made, till the seal of the Court has been lifted from the wax, as it is picturesquely expressed.

As to voluntary sales, those at any rate of land, they take two days. The first day there is an auction, and the highest bidder receives a "treckgelt" or "strijckgelt," "premium quod datur augenti pretium," as Matthaeus calls it (lib. 1, ch. 1, s. 6, and ch. 9, s. 11). In consideration of this "premium" the bidder is provisionally bound, but the vendor is not bound. On the second day the vendor makes a starting price, usually one-third higher than the highest bid of the previous day, and then descends (the process being called "afstach") till some bidder calls out "Mine" (see "Matthaeus," lib. 1, ch. 12, s. 1). This process is so prevalent that a verb has been coined, "mijnen" "to mine," meaning to bid, and bidders of all sorts are called "mijnders" (lib. 2, ch. 2, s. 5). Hence, too, comes the English phrase a "Dutch auction." The vendor is apparently not bound to keep reducing, but can withdraw at any stage. If, however, he chooses, he can descend to the level reached by the highest bid at the first day's sale, and if no one else bids, compel the bidder of the first day to complete his bargain.

Though Matthaeus refers but slightly and allusively to this practice, he certainly knew of it. But the difficulty is to fit those observations of his, on which the plaintiff and the judges in the

Supreme Court rely, to either form of competitive sale. Necessary sales are by way of auction, but it is clear that the highest bidder at the auction cannot claim to have bought the property, though he may be bound to complete his purchase. In voluntary sales the first step is by way of auction, but the highest bidder cannot claim to have bought the property, though he may in a certain event be bound to complete his purchase. During the second stage of reduction it may be that the vendor offers the property at every price which he names. If the observations of Matthaeus on which reliance is placed are intended for a sale by reduction, they have no application to the case before their Lordships. If they contemplate a sale by auction, they are theoretical merely.

These observations of Matthaeus are to be found in bk. 1, ch. 10, De Licitationibus, ss. 44-48. In s. 40 he is drawing the distinction between necessary and voluntary sales, and insisting as against other authorities that in necessary sales there is no concluded bargain till the seal of the Court has been attached.

Contrariwise in voluntary sales, the matter is completed, "simul augendi seu adjiciendi facultas praecisa sit." But this passage leaves it an open question when the "facultas" is "praecisa." It may be by the last bid, or it may be by acceptance of the last bid. In s. 41 he appears to admit of the prolongation of the auction from day to day till the vendor is satisfied. In s. 43 he discusses the question whether a bidder can withdraw his bid, and concludes, in contradiction to other authorities, which he quotes, that he cannot. But whether this means that he cannot withdraw when once the words are out of his mouth, or that he cannot withdraw when his bid has been accepted, or has been taken as a bid so that a further bid is made upon it, does not appear.

Lastly, in s. 48 he puts the question whether, after bids have been made, but there has been no acceptance by the vendor, "post licitationes facta ante tamen addictionem," the vendor can withdraw. He states, and states correctly, that the authority of Bartolus and of Damhouder is against him; but he concludes, and this is the passage mainly relied upon, that the vendor cannot withdraw. His reasons are that it would be absurd that the bidder should be bound and not the vendor, and that he who proclaims that he is going to hold a sale by auction tacitly promises that the property shall be sold

J. C. 1918

DEMERARA TURF CLUB v. WIGHT.

to the winning bidder "ei qui vicerit licitatione." As to the first reason, it may be observed that there are cases where it will happen that the bidder is bound while the vendor is not: as to the second reason, that, pushed to its logical conclusion, it would extend to prevent the vendor from withdrawing the property before any bid was made, as it would disappoint the company, or from announcing that there is a reserve, or from stating any conditions of sale which he has not previously advertised, unless indeed they be in common form.

It is further to be noticed, as the Chief Justice points out in his judgment, that Matthaeus does not take the view that the auctioneer offers and the bidder accepts. There are Continental writers on jurisprudence who take this view; for instance, Puchta, Pandekten (6th ed., by Rudolph, Leipzig, 1852, s. 252). Voet also is claimed for it; and it is certainly the view of his translator and editor, Berwick; and it is the view to which Hill J. expressly gives his assent. But it is not that of Matthaeus. He takes the more common view that the bidder offers and the auctioneer accepts; but he thinks, for the reason which he gives, that the auctioneer has tacitly promised to accept.

Remembering that there were in the Dutch usage of his time no conclusive auctions with rising bids, their Lordships think that Matthaeus, if he was writing of such auctions, was writing as a professor of jurisprudence and not as a witness bearing testimony to the existing Roman-Dutch law.

As to other writers, Bartolus, so far as he is an authority to be quoted on Roman-Dutch law, takes, as Matthaeus admits, the contrary view. So does Damhouder, a practising lawyer and writer in Holland. Grotius is quoted on other points by Matthaeus, but has made, apparently, no statement on this point. Voet, it is suggested, favours Matthaeus's view; but it is not clear that he does, and he has very much involved himself with addictio in diem. Van Leeuwen and Van der Linden are apparently silent on the point. Sir Andries Maasdorp in his Institutes of Cape Law (vol. 3, p. 130) certainly expresses himself to the effect that the sale is not completed till the fall of the hammer. On the other hand, Burge in his Foreign and Colonial Law (vol. 2, p. 576) and Nathan in his Common Law of South Africa (vol. 2, p. 718) translate and accept Matthaeus.

The industry of counsel has furnished their Lordships with quotations from several other writers not mentioned in the judgments of the Courts below; but they are chiefly interesting for their full statements as to Dutch usage and for their silence on the point in question.

One modern author, S. J. Fockema Andreae, in a work published at Haarlem in 1896, speaking of the usage of lighting a candle for the period of the auction, says that the last bidder before the candle burnt out is the purchaser, if his offer be accepted.

On the whole, their Lordships are of opinion that there is no rule of Roman-Dutch law which prescribes that at sales by auction the bidder is the acceptor. In sales by reduction it may be otherwise. Neither is there any rule that the highest bidder can insist that the property shall not be withdrawn from sale and claim to have bought it. This being so, the matter is governed by the provisions in the conditions of sale, and they indicate with sufficient clearness that the offer will come from the bidder, and that there is no bargain till it has been accepted by the auctioneer, and they do not indicate that the auctioneer is bound to accept the highest bid.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, that the judgment of the Supreme Court should be reversed and that of the Chief Justice restored, and that the appellant company should have its costs in the Court below and of this appeal.

Solicitors for appellants: *Druces & Attlee.*
Solicitors for respondents: *Lawrance, Webster, Messer & Nicholls.*

[HOUSE OF LORDS.]

H. L. (E.)* 1918 *May* 31.

WILLIAM WARNER'S SONS AND COMPANY Appellants;

AND

MIDLAND RAILWAY COMPANY . . . . Respondents.

Et e Contra.

Railway—Rates—Carriage of Frozen Fish—Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 *Vict. c. ccxix.*), *Schedule.*

Canadian salmon, frozen hard as soon as caught, then packed in grease-proof paper and additional paper wrappings, and finally put into boxes adapted for cold storage, was shipped to Liverpool and then conveyed by train to Leicester.

In an action by the Midland Railway Company against the consignees for payment of the carriage the question was raised whether the frozen salmon was to be charged for as "fresh fish" under class 4 of the classification contained in the schedule to the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891, or as "preserves (fish, fruit, meat and provisions) in casks, boxes or cases" under class 2, or under class 3 as unclassified merchandise:—

Held, that the salmon fell under the head of "preserves."

Decision of the Court of Appeal reversed and decision of the King's Bench Division restored.

Appeal and Cross-Appeal from a decision of the Court of Appeal setting aside an order of the Divisional Court, which affirmed a judgment of the county court judge of Leicestershire.

The Midland Railway Company (hereinafter called the respondents) brought an action in the county court against William Warner's Sons & Co., fish merchants of Leicester (hereinafter called the appellants), for payment for the carriage on their railway of certain consignments of (inter alia) frozen salmon dispatched from Alaska and British Columbia to Liverpool and thence conveyed by railway to Leicester.

The respondents contended that they were entitled to charge for the salmon as for "fresh fish" under class 4 of the classification embodied in the schedule to the Midland Railway Company (Rates

* *Present:* Lord Finlay L.C., Viscount Haldane, Lord Shaw of Dunfermline, and Lord Parmoor.

and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxix.), and alternatively under class 3 as for traffic not specified in the classification.

The appellants contended that the salmon fell within class 2 of the classification under the head of "Preserves (fish, fruit, meat and provisions), in casks, boxes or cases."

The facts are fully stated in the judgments of the Lord Chancellor and Lord Parmoor.

The county court judge held that the salmon fell under the heading "Preserves" in class 2, and his judgment was affirmed by the Divisional Court (Lush and Bailhache JJ.).

The Court of Appeal (Swinfen Eady L.J., Bankes L.J., and Bray J.), on the contrary, held that the salmon in question was unclassified and therefore chargeable under class 3.

The respondents by their cross-appeal claimed that the salmon was fresh fish within class 4.

1918. April 23. *Holman Gregory K.C.* and *Frederick Hinde* for the appellants. Fish preserved from decay by refrigeration is not fresh fish within the meaning of this classification, and all the Courts have so held, but the Court of Appeal have drawn a distinction between preserves of fish and preserved fish. Having regard to the context, there is no foundation for this distinction, and in a guide issued for the use of traders by the respondents themselves, headed "General Railway Classification of Goods by Merchandise Trains" there appears the entry "Fish, Preserved—(see Preserves)," showing that the respondents regarded preserved fish as falling within class 2.

G. J. Talbot K.C. and *Frank Gover* for the respondents. This is fresh fish within the classification, which was intended to be exhaustive. It is fresh fish as opposed to dried, smoked, cured or salted fish. The object of freezing the fish is to keep it fresh. "Fresh" has reference to the condition of the fish and does not relate to the time at which it is killed. There are different classes of fresh fish, one of which is frozen fish. Frozen meat is constantly spoken of as fresh meat. If this is not fresh fish it is unclassified.

Holman Gregory K.C. replied.

The House took time for consideration.

H. L. (E.) 1918

WILLIAM WARNER'S SONS AND COMPANY v. MIDLAND RAILWAY.

1918. May 31. LORD FINLAY L.C. My Lords, the question in this case is whether salmon from Alaska and from British Columbia to this country is "fresh fish" for the purpose of a rate to be charged for railway carriage, and, if not, under what class it falls for the purpose of such rate.

The salmon is preserved from putrefaction by being frozen hard when taken. It is then elaborately packed and treated in the manner described in the judgment of the county court judge of Leicestershire before whom this case was first brought. When the fish reaches England it is as hard as a piece of wood, and, as the learned county court judge said, "it is some weeks old, and, but for the preventive process which I have mentioned, decomposition would long before have set in."

All the judges before whom the case has been—the county court judge, the Divisional Court (Lush and Bailhache JJ.), and the Court of Appeal (Swinfen Eady L.J., Bankes L.J., and Bray J.) have held that the salmon when it so reaches England is not "fresh fish" for the purpose of rates for railway carriage. In my opinion they were clearly right in so holding. Fish which has been preserved from decay by artificial means for months or years is not fresh in any ordinary sense of the term. It may be as good as when it came out of the water, but, however this may be, it is not fresh. It owes its good condition to the process to which it has been subjected. The word "fresh" is no doubt often used (as was pointed out by Mr. Talbot in his interesting argument) to denote meat which, owing to extreme cold, has kept in condition for very long periods of time. But that is not the sense in which the word is used in the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891, as I read it, and I do not think that in the ordinary use of language meat or fish which had been preserved from decay for so long a period as here by the artificial application of cold would be spoken of as "fresh meat" or "fresh fish."

The county court judge and the Divisional Court held that the salmon fell to be charged under the head "Preserves." The Court of Appeal differed from them upon this point, and held that salmon so preserved was not classified at all, and therefore fell to be charged under class 3 by virtue of art. 20 of the schedule to the Act of 1891. On this point I think that the county court judge and the Divisional

Court were right. "Preserves" cannot be considered as relating merely to what may be called confections. It seems to me to include, when it occurs in class 2, preserved fish, whether preserved whole or in small pieces or otherwise. The words are "Preserves (fish, fruit, meat and provisions) in casks, boxes or cases." We are, I think, entitled to look at the general railway classification of goods issued by the railway companies on January 1, 1916, as a dictionary to help us on this point. I find that for the rates to be charged for "fish (preserved)" the public are referred to "preserves" (p. 71). Under the head of "Preserves" at p. 147 occurs the following :—

	Class
"Preserves (Fish, Fruit, and Provisions) in glass or earthenware jars or bottles :—	
In casks	2
In boxes or cases at owner's risk only unless protected by packing as shown below or in such other manner as has been previously approved by the railway companies	2
In crates or baskets	3
E.o.h.p. [Except otherwise herein provided]	4
"Preserves (Fish, Fruit and Provisions), E.o.h.p. :—	
In casks or boxes	2
In cases	2
In tins packed in crates	2
In crates, E.o.h.p.	3
In baskets	3
E.o.h.p.	4"

This appears to me to show that whole fish preserved by any process such as that used here is included under the heading "Preserves."

I therefore think that the decision of the county court judge, confirmed by the Divisional Court, should be restored and that the appellant should have his costs of this appeal and of the cross-appeal.

VISCOUNT HALDANE. My Lords, the question before us is whether salmon brought here from Canada, frozen hard as soon as caught, then packed in grease-proof paper and additional paper wrappings,

H. L. (E.) 1918

WILLIAM WARNER'S SONS AND COMPANY v. MIDLAND RAILWAY.

Viscount Haldane.

and finally put into boxes adapted for cold storage, come within the class called "Preserves (fish, fruit, meat and provisions) in casks, boxes or cases" in the classification of merchandise traffic annexed to the schedule to the respondents' Rates and Charges Order Confirmation Act, 1891. If the question is answered in the negative a further question arises, whether the salmon so treated are "fresh fish" within the meaning or the classification or are unclassified.

I have come to the conclusion that the earlier question must be answered in the affirmative and that accordingly no further question arises.

My Lords, the contention of the respondent railway company is that the word "fresh" in the context which I have quoted is wide enough to include the case of fish which were fresh when killed and had remained free from decomposition because of the freezing process and the attendant packing and cold storage, and in that sense were fresh when ultimately received by the railway company for carriage. It makes no difference, so it is argued, to the title to regard the fish as fresh that a long time, in which under ordinary circumstances they would have become decomposed, has elapsed before they are brought for transit by rail in England. For they have remained as they were when caught. For myself I cannot regard this contention as sustainable. I think that it was quite natural that the railway company should mean to obtain a higher rate for carrying fish which, being fresh in a different and ordinary sense, would perish if there was delay in transit. They might well claim a higher charge in the classification which the statute has sanctioned for fresh fish of this kind including salmon. But in the case of the salmon in question it does not appear that the unusually rapid carriage is of importance or is demanded. The delay is of little moment. The real reason for accepting a lower rate for "preserves" which include fish is surely that there is no occasion to be in a hurry with fish that will not perish. In their own general classification in detail as advertised for the guidance of traders they specify "fish preserved" as to be carried cheaply, and refer for the meaning of the item to the "preserves," inclusive of fish in boxes, described in another part of their list. I think that in so doing they show that they mean to include under "preserves" fish preserved from decomposition and packed in boxes, whether or not the

fish are in a state resembling that in which they came out of the water.

My Lords, I cannot agree with the view which underlies the judgments in the Court of Appeal that in order to come within the definition of what is a "preserve" the salmon in question would have to suffer a change in its original character greater than that which the refrigerating process and the preservation through special packing and treatment impart to it. I think the effect which is actually produced is quite enough to prevent the salmon from being fresh, either in ordinary parlance or within the meaning of the words of the classification. To me it appears that the judgments of the county court judge and of the Divisional Court were right, and that the appeal to this House ought to succeed.

LORD PARMOOR. My Lords, under the Railway and Canal Traffic Act, 1888, inquiries were held as to the classification of merchandise traffic, and the schedule of merchandise rates and charges which in the opinion of the Board of Trade should be adopted by the various railway companies in this country. These schedules are substantially identical in all cases, but the particular schedule under which the question in this appeal arises is attached to the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891. The effect is that, as from the date when the schedule becomes operative, the Midland Railway Company is entitled to charge, in respect of merchandise traffic on their railways, the rates and charges specified in the schedule, subject to the classification, regulations, and provisions therein set forth,

In approaching the construction of this schedule, I think it is important to bear in mind that the classification was intended to be inclusive of all forms of merchandise traffic being carried at that date as articles of commerce, and that there is a prima facie presumption that such articles were included. In the present case there is no evidence that the frozen salmon was not a known article of commerce when the classification was framed. Sect. 20 of the schedule contains a provision that "In respect of any merchandise or article of any description which is not specified in the classification, the company may, unless and until such merchandise or article is duly added to this classification and schedule

H. L. (E.) 1918

WILLIAM WARNER'S SONS AND COMPANY v. MIDLAND RAILWAY.

Lord Parmoor.

pursuant to sub-section eleven of section twenty-four of the Railway and Canal Traffic Act, 1888, make the charges which are authorised in respect of merchandise and things in class 3." The frozen salmon in question is not an article of merchandise which has been added to the classification under this provision, and the result is that, if it is an unclassified article, the railway company would be entitled to make the charges authorized in class 3.

The appellants are importers and dealers in frozen fish as shipped from Alaska and British Columbia. Such fish, before being dispatched from Alaska and British Columbia, is frozen hard, and each fish, or piece of fish, is wrapped first in two pieces of grease-proof paper and then in brown paper. Each parcel of fish is then put into a thick paper bag and is packed with other similar parcels in a strong wooden box or case lined inside with bituminous card. When the fish reaches the defendants at Leicester it is still frozen and hard like wood and when struck gives a ringing note. The fish is necessarily some weeks old when it reaches Liverpool or other port for unloading, but it is frozen hard and thus preserved from decomposition. The respondents claim that they are entitled to charge the frozen salmon as fresh fish under class 4 of the classification, or in the alternative under class 3. The appellants, on the other hand, contend that the frozen salmon is classified under class 2. This contention was upheld by the county court judge and the Divisional Court. The Court of Appeal held that the frozen salmon was an unclassified article, and therefore chargeable under class 3. It is against this decision that the appellants appeal, and there is a cross-appeal by the respondents.

In considering the construction of the classification the words used should be given their ordinary normal meaning, having regard to the context in which they occur, and to the general purpose of the classification considered as a whole. "Verba intelligenda sunt ex proprietate, non grammatica quae est ex origine, sed populari ex usu" (Grotius).

In my opinion, frozen salmon sent from Alaska or British Columbia and packed as described would not ordinarily be designated as fresh fish. Mr. Talbot, however, argued that, in the context, "fresh fish" was used in contrast to fish dried or thoroughly salted or dried in class 1, or fish partially cured, smoked, or dried in class 2, and that as the classification should, prima facie, be regarded as inclusive, the

context required that the frozen salmon should be regarded as fresh fish. I agree in the statement that the classification should prima facie be regarded as inclusive, but the fallacy of Mr. Talbot's argument is that he seeks to place a narrow interpretation upon the words " Preserves (Fish, Fruit, and Provisions) in casks, boxes or cases " in class 2 of the classification, an interpretation which has been adopted by the Court of Appeal. This interpretation is based on a contrast between the words " preserves " and " preserved," and it is contended that the word " preserves " is not applicable to preserved fish, but only to preserves of fish—that is to say, to an article that has gone through some treatment or process which has to some extent changed its original character. My Lords, I see no reason for this limitation. The guiding words of the classification refer primarily to the method of packing in casks, boxes, or cases which determine convenience for handling and dispatch. Where preserves are packed in crates or baskets, they are placed under class 3. Your Lordships were referred to the general railway classification of goods, which strongly supports the contention of the appellants. Under the heading " fish " appears the entry " Fish, Preserved—(see Preserves)," and under " Preserves " the fish may be either in glass or earthenware jars or bottles packed in casks, or directly packed in casks or boxes, again implying that the distinction is not so much in the method of preservation as in the method of packing. In my opinion the frozen salmon comes within the word " Preserves (fish) in casks or boxes " and are classified to be charged under class 2. There is no ground for adopting the narrow interpretation which would exclude from this class an article which has been preserved without undergoing some change in its original character.

If, however, the words in the context are to be regarded as of ambiguous meaning, it is admissible to consider the general purpose of the classification. I agree with the statement of Lush J. that the ruling considerations in fixing the classification of goods for carriage by railway are (1.) the marketable value of the goods, and (2.) the ease or the difficulty of handling them. I think that due weight is given to these considerations in placing the frozen salmon in class 2. The fresh fish included under class 4 is fish of an expensive character in its fresh state and such as would require to be handled with care

H. L. (E.) 1918

WILLIAM WARNER'S SONS AND COMPANY v. MIDLAND RAILWAY.

Lord Parmoor.

and quick dispatch. Frozen salmon is probably a less expensive article than salmon fresh from the water, and when packed in boxes would certainly not require in handling either the same care or dispatch as a consignment of fresh fish. I have not overlooked the provisions in the schedule for the carriage of perishable merchandise by passenger train, but these provisions do not affect the present question.

My Lords, in my opinion the frozen salmon falls to be carried under class 2 of the classification, and the appeal should be allowed and the cross-appeal dismissed.

LORD SHAW OF DUNFERMLINE. (1) My Lords, I have had the pleasure of reading the judgment of my noble and learned friend Lord Parmoor, and I entirely agree with his opinion.

The contract is for the carriage of salmon. The question can be viewed in two ways, either from the point of view of the natural meaning of the words used in the contract, or, on the other hand, of any artificial meaning which in their contracts the parties attached to the words. Upon the first point my opinion is as follows: Is this a contract for the carriage of "Preserves (fish . . . .) in casks, boxes or cases," or is it a contract for the carriage of "Fish, fresh"? As a matter of fact, really admitted, no honest merchant would sell the Yukon article, preserved artificially and sent over to the British market, as fresh fish. The observations upon that subject in the judgment of Lush J. in the Divisional Court appear to me to be unanswerable.

But, then, say the respondents, while this is so according to the natural use of the words in ordinary business as regards fresh fish, yet we the railway company found upon the special meaning attached to "preserves" as applicable to fish. It means, say they, some preparations of fish, some compost, possibly mixed with other substances: in short, the analogy is with preserves in the household sense, that is to say, with substances like jam; it does not apply to whole fish which are in fact preserved but are carried as whole fish.

Unfortunately the railway company by the "classification of goods" used in its business by the company and by traders is its

(1) Read by Lord Dunedin.

own lexicographer. In that work fish appears under various heads, namely: (1.) "Fish," with numerous varieties specified, and not including salmon; (2.) "Fish, *fresh*, e.o.h.p." (that is to say, except otherwise herein provided); (3.) "Fish, *fresh*," including expressly "salmon" among the varieties named. Then, however, there is category (4.), which is: "Fish, preserved," that is to say, this very case; and the entry follows with this reference, namely, "see Preserves." From this it appears to me to be made clear that fresh fish is one article falling as such by the classification under the higher charge of class 4, and preserved fish is another article falling under the lower charge (being in boxes) of class 2.

This, I should add in conclusion, entirely squares with the notorious facts as to the greater care and cost and expedition required in the case of really fresh fish in ordinary denomination as compared with those required in the case of preserved fish.

I agree.

Order of the Court of Appeal reversed, and order of the King's Bench Division restored. Cross-appeal dismissed. The Midland Railway Company to pay the costs in the Courts below, and also the costs of the original and cross appeals to this House.

Lords' Journals, May 31, 1918.

Solicitors for appellants: *Smith, Fawdon & Low, for Sir Thomas Wright, Son & Aysom, Leicester.*

Solicitors for respondents: *Beale & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* 1918 *June* 25.

BANBURY . . . . . APPELLANT;

AND

BANK OF MONTREAL . . . . . RESPONDENTS.

Banker—Negligence—Duty to advise Customer as to Investment—Authority of Manager—Liability of Bank—Parol Representation as to Credit—Statute of Frauds Amendment Act, 1828 (*Lord Tenterden's Act*) (9 *Geo.* 4, *c.* 14), *s.* 6—*Practice—Point of Law not raised at Trial, whether allowable on Appeal.*

Sect. 6 of the Statute of Frauds Amendment Act, 1828 (Lord Tenterden's Act) (9 Geo. 4, c. 14), applies to fraudulent representations only.

Per Lord Parker of Waddington and Lord Wrenbury: The word "person" in s. 6 includes a corporation.

The omission of the defendant in a jury action to ask the judge at the trial to nonsuit the plaintiff or to direct a verdict for the defendant on the ground that there was no evidence upon which the jury could reasonably find for the plaintiff does not preclude the Court of Appeal on a motion for a new trial from entertaining the question of no evidence, and in a proper case the Court, under Order LVIII., r. 4, may order judgment to be entered for the defendant on that ground, notwithstanding such omission.

So *held* by Lord Atkinson, Lord Parker of Waddington, and Lord Wrenbury; Lord Finlay L.C. and Lord Shaw of Dunfermline dissenting.

Per Lord Atkinson, Lord Parker of Waddington, and Lord Wrenbury: The question whether the Court of Appeal should allow a point of law not raised in the Court of first instance to be raised on appeal goes, not to jurisdiction, but to discretion.

The plaintiff in 1911 went to Canada on pleasure and stayed at Montreal with the general manager of the defendant bank, who gave him a letter of introduction to the branch managers asking them if he applied for assistance or advice to place themselves at his disposal. In 1912 he again visited Canada, seeking investments, and presented the letter of introduction to G., the defendants' branch manager at V., upon whose oral advice he invested the sum of 25,000*l.* upon a mortgage to secure a loan to a Canadian company, who were customers and debtors of the bank. The advice, which was honestly given, involved oral representations as to the credit of the company. The company having failed to pay either interest or

---

* *Present:* LORD FINLAY L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, and LORD WRENBURY.

principal, the plaintiff brought an action against the bank, claiming damages for negligence and breach of duty while acting as his bankers and advisers. It was admitted that G. had no general authority to advise as to investments. At the trial judgment was entered for the plaintiff on the findings of the jury for 25,000*l.* :—

Held : (1.) (reversing the decision of the Court of Appeal), that s. 6 of Lord Tenterden's Act did not apply to the action.

Held, further (by Lord Atkinson, Lord Parker of Waddington, and Lord Wrenbury ; Lord Finlay L.C. and Lord Shaw of Dunfermline dissenting) (2.) (affirming the decision of the Court of Appeal), that there was no evidence upon which the jury could reasonably find that G. had authority to advise the plaintiff as to his investments or that the bank owed any duty to the plaintiff to advise him carefully or at all, and (3.) that in the circumstances it was open to the Court of Appeal to order judgment to be entered for the defendant bank on the ground of no evidence, notwithstanding that the point had not been raised at the trial.

Decision of the Court of Appeal [1917] 1 K. B. 409 affirmed.

APPEAL from an order of the Court of Appeal (1) setting aside a verdict and judgment in favour of the plaintiff, the appellant, on the trial of the action before Darling J. and a special jury, and ordering judgment to be entered for the respondents.

The main question involved in the appeal was as to the responsibility of the respondents for advice given to the appellant by one of their managers with regard to investments.

The appellant, Captain Banbury, by his statement of claim alleged, in effect, that he was a customer of the respondents, the Bank of Montreal, and in September, 1912, consulted them as to investing money in Canada ; that the respondents, by their agent and manager Galletly, orally advised the appellant to invest a sum of $125,000 (25,000*l.*) in a loan on mortgage to the Westholme Lumber Company, which was then engaged upon a contract to construct certain waterworks for the city of Victoria, that the investment was perfectly safe, and that the money was required to enable the company to complete the contract and was amply sufficient for the purpose ; that the appellant, in reliance upon the said advice, advanced the money upon the proposed security ; that the advice so given by the respondents was negligent and unskilful in that the investment was highly speculative and unsafe, and that the money was wholly insufficient for the completion of the contract ; that a

(1) [1917] 1 K. B. 409.

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

receiver had been appointed of the company's assets; and that the appellant, by reason of the respondents' negligence, had lost his money; and he claimed damages against the respondents for negligence and breach of duty while acting as the bankers and advisers of the appellant.

The respondents by their defence denied that any advice was given by Galletly, and alleged, in the alternative, that if the advice was given, Galletly was acting outside the scope of his authority as manager of a branch bank of the respondents, and, further, that the advice was given honestly and in good faith and without negligence.

The action was originally tried before Lord Reading C.J. and a special jury, when the jury disagreed.

At the second trial the respondents, by leave of the Court, amended their defence by adding a paragraph claiming that the action was not maintainable by reason of Lord Tenterden's Act.

The facts are fully stated in the report of the case before the Court of Appeal and in the judgment of the Lord Chancellor.

At the second trial the jury, in answer to a series of questions put by the learned judge, found that Galletly had authority to advise the appellant to make the investment in question, that he gave the advice alleged in the statement of claim, that the plaintiff invested his money in reliance on that advice, and that the advice was negligently and unskilfully given; and they assessed the damages at 25,000*l.*; adding a rider to their verdict that all securities were to be returned to the respondent bank. Upon these findings Darling J., after holding that Lord Tenterden's Act was not a defence to the action, ordered judgment to be entered for the appellant for 25,000*l.*

The respondents by their notice of appeal applied for judgment or a new trial on various grounds, including the following: that there was no evidence that Galletly in advising the plaintiff as to the investment in question had authority to bind the respondents, and that there was no evidence that the advice was given negligently or unskilfully.

Neither of these points had been taken by the respondents at the trial of the action.

The Court of Appeal (Lord Cozens-Hardy M.R., Warrington L.J., and Scrutton L.J.) held that the respondents owed no duty to the

appellant to advise him carefully; that there was no evidence that Galletly had authority to bind the respondents; and that the action was within s. 6 of Lord Tenterden's Act (1) and was therefore not maintainable. They therefore allowed the appeal and ordered judgment to be entered for the respondents.

1918. Feb. 21, 22, 25, 26, 28; March 1, 4, 5, 7, 8, 12, 14, 15. *G. J. Talbot K.C.* and *Douglas Hogg K.C.* (with them *S. Lowry Porter*) for the appellant. If a person carrying on a business or profession takes upon himself to give advice on a matter as to which he has or professes special skill or knowledge in the way of that business or profession, in such circumstances that the person advised relies upon that special skill or knowledge, he is under a duty to that person to use due care in advising him: *Skelton* v. *London and North-Western Ry. Co.* (2) If a servant or agent, acting in the course of his employment, gives such advice, he is under the like duty, and for the breach of that duty the employer or principal is liable: *Mullens* v. *Miller* (3); *Barwick* v. *English Joint Stock Bank* (4); *Lloyd* v. *Grace, Smith & Co.* (5); *Smith* v. *Martin.* (6) It is conceded that it is not the business of a banker to advise generally as to investments in the sense that he is bound to give advice, but if he does give advice about such matters, as to which he has a special knowledge as banker, he is bound to give it carefully, and this applies equally to his agent or servant. In this case Galletly did give such advice and gave it without care, and there was evidence upon which the jury were entitled to find that in so doing he was acting in the course of his employment. The appellant relies particularly on the express authority conferred by the letter of the general manager and upon the special knowledge which Galletly

(1) Lord Tenterden's Act (9 Geo. 4, c. 14), s. 6: "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon [*sic*], unless such representation or assurance be made in writing, signed by the party to be charged therewith."

(2) (1867) L. R. 2 C. P. 631, 636.

(3) (1882) 22 Ch. D. 194.

(4) (1867) L. R. 2 Ex. 259, 265.

(5) [1912] A. C. 716, 735–6.

(6) [1911] 2 K. B. 775, 782.

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

possessed of the affairs of the Westholme Company. It is no answer to the appellant's claim to say that the advice was given gratuitously. "The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it": Sm. L. C., 12th ed., vol. 1, p. 207, notes to *Coggs* v. *Bernard* (1); *Donaldson* v. *Haldane* (2); *Shiells* v. *Blackburne* (3); *Wilkinson* v. *Coverdale.* (4) See also *Pritty* v. *Child* (5); *Gladwell* v. *Steggall* (6); *Brown* v. *Boorman.* (7) Further, the points that there was no evidence that Galletly had authority to bind the bank and that there was no evidence of negligence were not open to the respondent bank in the Court of Appeal, as they were not taken at the trial, and are not open to them now. Here the respondents not only acquiesced in these points being submitted to the jury, but elected to submit them. The question of no evidence is a point of law, and the modern authorities since the Judicature Act show that judgment cannot be given by the Court of Appeal upon a point of law which is not raised at the trial: *Graham & Sons* v. *Huddersfield Corporation* (8), where it was held that the appellants had waived the point of law because it was not submitted before verdict. This is an a fortiori case, because the points of law in question were not submitted to the trial judge at any time. The reason assigned for this rule by Lord Halsbury is that where a party at the trial has taken his chance of what the jury would do it would be mischievous to allow him to raise new questions of law after the jury has decided against him: *Macdougall* v. *Knight* (9), and Lord Bramwell concurs in this opinion. These decisions merely carry on the practice which existed prior to the Judicature Acts: *Horlor* v. *Carpenter.* (10) Sect. 6 of Lord Tenterden's Act has no application. First, it has never been suggested that that section can be applied to defeat an action for negligence if in the course of the evidence necessary to establish the negligence there occurs something which may be described as a representation

(1) (1703) 2 Ld. Raym. 909.
(2) (1840) 7 Cl. & F. 762; affirming the Court of Session (1836) 14 S. 610.
(3) (1789) 1 H. Bl. 158, 161.
(4) (1793) 1 Esp. 75.
(5) (1902) 71 L. J. (K.B.) 512.
(6) (1839) 8 Scott, 60; 5 Bing. N. C. 733.
(7) (1844) 11 Cl. & F. 1, 44.
(8) (1895) 12 Times L. R. 36.
(9) (1889) 14 App. Cas. 194, 199, 203.
(10) (1857) 27 L. J. (C.P.) 1, 4.

as to the credit of a third party. The appellant is not seeking to charge the respondents "upon or by reason of" any representation or assurance. Secondly, notwithstanding the generality of the language, the section applies only to actions founded on fraud, because at the time the Act was passed fraudulent representations only were actionable. Thirdly, the section does not apply to a representation as to the credit of a corporation. "Person" as used in the section means a natural person. It is impossible in the place where the word "person" first occurs in the section to treat it as meaning anything but a natural person and it must receive the same interpretation throughout. The decisions upon this section in order of date are as follows:—In *Lyde* v. *Barnard* (1) the judges differed as to the application of the section, but they agreed that it related to fraudulent representations only. That case shows that the statute was designed to meet the mischief of *Pasley* v. *Freeman* (2) and that line of cases in enabling the Statute of Frauds to be evaded. In *Haslock* v. *Fergusson* (3), although the action was in form an action of assumpsit, the representation was the very gist of the action. *Swann* v. *Phillips* (4) is described in the report in Adolphus and Ellis as an action of assumpsit; but this was probably a mistake of the reporter, as it is described in four other contemporary reports as an action on the case for fraud, and it was directly based on fraudulent representation. In *Devaux* v. *Steinkeller* (5), again, the representation was fraudulent. In *Craig* v. *Watson* (6) the defence of the Act was not successful, and relief was granted on equitable grounds. In *Tatton* v. *Wade* (7), the fraudulent representations being partly written and partly oral, the decision was that the action would lie if the plaintiff was substantially induced to give credit by the written representations, notwithstanding the oral representations, and Pollock C.B. there gives Lord Tenterden's reason for introducing the section, which agrees with the opinions expressed in *Lyde* v. *Barnard*. (8) *Williams* v. *Mason* (9) shows that the signature of an agent is not a sufficient

(1) (1836) 1 M. & W. 101, 103, 107, 113, 118.
(2) (1789) 3 T. R. 51.
(3) (1837) 7 Ad. & E. 86.
(4) (1838) 8 Ad. & E. 457; 3 N. & P. 447; 7 L. J. (Q.B.) 200; 2 Jur. 494; W. W. & H. 374.
(5) (1839) 6 Bing. N. C. 84.
(6) (1845) 8 Beav. 427.
(7) (1856) 18 C. B. 371, 381.
(8) 1 M. & W. 101.
(9) (1873) 28 L. T. 232.

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL.

signature within the meaning of the section, the language of which differs in this respect from s. 4 of the Statute of Frauds, and the reason suggested for this distinction was that to fix a person for a fraud you must fix him personally or not at all. *Swift* v. *Jewsbury* (1) is a decision to the same effect. The next two decisions under the Act, *Hosegood* v. *Bull* (2) and *Pearson* v. *Seligman* (3), have no close bearing on the present case. In *Bishop* v. *Balkis Consolidated Co.* (4) it was held that the Act did not apply to the statement there in question. *Hirst* v. *West Riding Union Banking Co.* (5) decides that the word "person" in this section applies to a corporation. That is inconsistent with the appellant's third contention under the Act and is, it is submitted, erroneous. [Upon the point as to the meaning of "person" they referred to *Pharmaceutical Society* v. *London and Provincial Supply Association* (6) and *Doe* v. *Hogg.* (7) They also referred to *Clydesdale Bank* v. *Paton* (8), a decision upon s. 6 of the Mercantile Law Amendment Act, Scotland, 1856, which combines the provisions of s. 4 of the Statute of Frauds and s. 6 of Lord Tenterden's Act.] *Langdon* v. *Godfrey* (9) and *De la Bere* v. *Pearson, Ld.* (10) are illustrations of actions similar to the present one in which it was not suggested that Lord Tenterden's Act could be set up; and, indeed, the Act has never been applied where the representation is merely adduced as evidence in support of another cause of action. As to misdirection, the criticisms of Scrutton L.J. in the Court of Appeal upon the summing-up of Darling J. are based upon a misapprehension of the duties of a judge in summing up. His main ground of objection is that the learned judge did not read a sufficient amount of the evidence. But it is entirely within the discretion of the trial judge whether he will sum up the facts at all or how much of the evidence he shall read, and, even if he expresses a mistaken opinion on the facts, that is not a misdirection, inasmuch as the facts are for the jury: Archbold's Queen's Bench Practice, 2nd ed., p. 195; 14th ed., p. 645;

(1) (1874) L. R. 9 Q. B. 301, 311–12, 316.
(2) (1876) 36 L. T. 617.
(3) (1883) 48 L. T. 842.
(4) (1890) 25 Q. B. D. 512.
(5) [1901] 2 K. B. 560.
(6) (1880) 5 App. Cas. 857, 861, 868–9.
(7) (1805) 1 Bos. & P. (N.R.) 306.
(8) [1896] A. C. 381, 390.
(9) (1865) 4 F. & F. 445.
(10) [1908] 1 K. B. 280.

Seaton v. *Burnand* (1); *Doe* v. *Strickland* (2); *Taylor* v. *Ashton*. (3) Assuming that there has been a technical misdirection, no injustice has been done, and no ground has been shown for a new trial: *Edmondson* v. *Machell*. (4) [Upon the question whether the appellant was a customer of the bank for the purposes of the present action they referred to *Prince* v. *Oriental Bank Corporation*. (5)]

P. O. Lawrence K.C. and *Norman Raeburn* for the respondents. 1. The respondent bank owed no duty to the appellant to use due care in advising him as to the investment in question. There is no evidence that advising as to investments at large, or as to investments on mortgage of real estate, which is an a fortiori case, come within the scope of business appertaining to bankers. [They referred to the Canadian Bank Act, 1906, ss. 3, 4, 76, 79, 80, 146.] It is essentially the business of solicitors and valuers. The special circumstances of this case, so far from showing any duty on the manager to advise, point in the opposite direction. It is suggested that giving advice as to this investment became banking business because the proposed mortgagees were customers and were heavily indebted to the bank, who were therefore interested in seeing that they obtained the money. But the last thing one would suppose is that it would become the business of a bank to do something outside their ordinary business which it would be improper for them to undertake because their duty and interest would conflict. Assuming that this was within the scope of the bank's business, still there is no duty to be careful because the advice was gratuitous. If you voluntarily undertake a business for another man, then, if you enter upon the business, you must exercise due care, but if you advise a man as to his own business no such obligation exists. *Coggs* v. *Bernard* (6) shows that a gratuitous bailee must exercise ordinary care. *Doorman* v. *Jenkins* (7) applies that doctrine to a bailee of money. *Giblin* v. *McMullen* (8) turned upon the degree of negligence necessary to establish liability in the case of a gratuitous bailee, and it was there held that a banker holding a customer's securities

(1) [1900] A. C. 135, 145.
(2) (1849) 8 C. B. 724, 743.
(3) (1843) 11 M. & W. 401, 416.
(4) (1787) 2 T. R. 4.
(5) (1878) 3 App. Cas. 325, 332.
(6) 2 Ld. Raym. 909; 1 Sm. L. C., 12th ed., 191.
(7) (1834) 2 Ad. & E. 256.
(8) (1868) L. R. 2 P. C. 317.

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL.

was in the circumstances not liable for their theft because there had been no want of ordinary diligence. In *In re United Service Co.* (1) it was held that the banker was not a gratuitous bailee by reason of the commission he received for collecting the dividends. This class of case—as to gratuitous bailee—does not come into consideration in the present case. In *Coggs* v. *Bernard* (2) Lord Holt mentions incidentally the case where a man gratuitously undertakes to perform some act or render some service to another. In such a case, if he actually enters upon the work he must use due diligence, but the confidence reposed in him is no sufficient consideration so long as the agreement is executory. Even if the man has entered upon the service, there is no case which shows that he is bound to go on to completion ; but in what he does he is bound to use due diligence, and this applies to the omission to take a necessary step. The distinction between the case where the agreement is executory and the case where the work has been begun is recognized in several cases : *Shiells* v. *Blackburne* (3) ; *Elsee* v. *Gatward* (4) ; *Skelton* v. *London and North-Western Ry. Co.* (5) *Wilkinson* v. *Coverdale* (6) and *Whitehead* v. *Greetham* (7) proceed upon this distinction. Giving advice is distinct from doing an act and is not the performance of a service. But the authorities show that an action will lie only where there has been some interference with the property or person of the party to whom the voluntary undertaking has been given, or where there has been the rendering of a service as agent. *Donaldson* v. *Haldane* (8) is relied upon by the appellant as showing that a solicitor may be made liable for gratuitous advice. But that case is distinguishable (1.) because there is nothing in the facts to show that the solicitor undertook to act voluntarily ; he was acting for both mortgagee and mortgagor, and he did not charge the mortgagee because presumably he got his charges from the mortgagor ; (2.) because he not only advised but actually prepared the mortgage ; (3.) because that was an appeal from the Court of Session in Scotland, and the doctrine of

(1) (1870) L. R. 6 Ch. 212.
(2) 2 Ld. Raym. 909; 1 Sm. L. C., 12th ed., 191.
(3) 1 H. Bl. 158, 159.
(4) (1793) 5 T. R. 143, 148, 150.
(5) L. R. 2 C. P. 631, 636.
(6) 1 Esp. 75.
(7) (1825) 2 Bing. 464.
(8) 7 Cl. & F. 762.

consideration forms no part of the law of Scotland. *De la Bere* v. *Pearson, Ld.* (11) is not opposed to the respondents' contention. There newspaper proprietors held themselves out as giving financial advice, coupled with the stipulation that there should be publication of the question and answer in their newspaper. It was held that the stipulation as to publication was sufficient consideration. If gratuitous advice had led to the contract to be careful it would not have been necessary to seek for consideration. No case can be found in the books where an action for negligence in giving gratuitous advice has been maintained, whether the advice be given by a person possessing special knowledge of the subject or not. The duty which it is alleged the bank owed to the appellant can arise in this case only if there is shown a valid contract to be careful. It is contract or nothing. To constitute a valid contract by the law of England there must be, first, an animus contrahendi and, secondly, consideration; but if any contract can be implied in this case there was no consideration, and therefore it was nudum pactum and no action will lie for the breach of it. Apart from contract, no duty to be careful can be implied in this case, (*a*) because there was no general duty on the bank to give careful advice to customers or others; (*b*) because the bank did not become bailees of, or interfere with any property of, the appellant; nor did they become agents for, or enter upon the performance of any act for, the appellant; and (*c*) because in the special circumstances the bank's interest and duty would conflict. It may well be that a duty would be implied in the case of a solicitor or physician, first, because of the public nature of the profession—a solicitor is an officer of the Court and a physician has various official duties in connection with the public health—and, secondly, because of the fiduciary relation between the parties. No such relation arises between a banker and a customer or intending customer, and no such duty can be implied. Stripped of its trimmings, this is really an action for a misrepresentation by Galletly without fraud, whereby the appellant has been induced to lend his money on this venture, but for an innocent misrepresentation no action for damages will lie.

2. Galletly had no authority to bind the bank. It was admitted by the appellant's counsel at the trial that a branch manager had

(1) [1908] 1 K. B. 280, 287.

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

no general authority to advise as to investments, and the letter of the general manager in no way extends the powers or duties of the branch managers. Some confusion has arisen between the question of authority and no authority and the scope of the bank's business. If it were part of the bank's business to advise as to investments there would be great difficulty in setting up any limitation on Galletly's authority in the absence of notice to the appellant, but, Galletly having no general authority, the letter carries the matter no further.

3. There was no evidence of negligence. This question depends on the meaning of advice. Advising is stating your opinion after informing yourself of the facts; it does not necessarily imply stating the facts on which your opinion is based or putting before the advisee all the pros and cons. Galletly's duty was to advise honestly to the best of his ability. Honesty is admitted, and it is not shown that he omitted to take into consideration any material fact which he ought to have known if he had taken reasonable care. The mere fact that the advice was unsound is not evidence of negligence.

4. As regards the damages, the judge ignored the evidence on this point and in any event there must be a new trial. If necessary, there is power to confine the new trial to the question of damages: R. S. C., Order XXXIX., r. 6.

5. As regards misdirection, if the respondents show misdirection, the onus is on the party supporting the verdict to show no miscarriage: *Anthony* v. *Halstead* (1), approved in *White* v. *Barnes*. (2) Here the judge has misled the jury as to the matters to be considered and as to the evidence. That is a misdirection: *Jefferson* v. *Paskell*. (3)

6. There was here ample jurisdiction for the Court of Appeal to enter judgment for the respondents, subject to the question whether that jurisdiction was fettered by the fact that the point as to no evidence was not taken at the trial: R. S. C., Order LVIII., r. 4; *Allcock* v. *Hall* (4); *Paquin, Ld.* v. *Beauclerk* (5); *Winterbotham, Gurney & Co.* v. *Sibthorp and Cox*. (6) It is suggested that if the point of no evidence had been taken the defect might

(1) (1877) 37 L. T. 433.
(2) [1914] W. N. 74.
(3) [1916] 1 K. B. 57, 74.
(4) [1891] 1 Q. B. 444.
(5) [1906] A. C. 148, 161.
(6) [1918] 1 K. B. 625.

have been cured, but in the circumstances of this case further evidence was impossible as all the principal parties to the transaction were dead. As regards the objection that the point of law was not raised at the trial, first, so far as appears, that objection was not taken, as it ought to have been, in the Court of Appeal, and it is too late to take it now: *Lamprell* v. *Billericay Union* (1); secondly, there is no inflexible rule that a point of law not raised at the trial cannot be raised afterwards. *Macdougall* v. *Knight* (2) is not a decision to that effect, but proceeded upon the special circumstances of the case. In *Eyre* v. *Highway Board of New Forest* (3) the appellant sought to make an entirely new case by setting up a limited as distinguished from an absolute dedication of the highway. In *Page* v. *Bowdler* (4) it was held that it was not open to the defendant in the Court of Appeal to raise the point that the relation of master and servant did not exist between him and the plaintiff as it was not raised at the trial. In *Graham & Sons* v. *Huddersfield Corporation* (5) the point of law was that there was no contract because it was not under seal. It is difficult to see why that point was rejected. The other two decisions can be justified on the ground of injustice to the plaintiff if the point was allowed to be taken. *Smith* v. *Baker & Sons* (6) does not apply, as it turned upon the construction of the County Courts Act, 1888, which strictly limited the right of appeal to a point of law taken at the trial.

[LORD ATKINSON referred to *Metropolitan Ry. Co.* v. *Jackson* (7) and *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery.* (8)]

7. As to Lord Tenterden's Act, the words being free from ambiguity, there is no ground for limiting the section to fraudulent misrepresentation: *River Wear Commissioners* v. *Adamson* (9) and the authorities there cited. Admitting that the motive for introducing the section was to defeat such actions as *Pasley* v. *Freeman* (10), the words go beyond the mischief originally aimed at and apply to any representations. Upon the question whether this is an action "by reason of" the misrepresentation, *Haslock* v.

(1) (1849) 3 Ex. 283.
(2) 14 App. Cas. 194.
(3) (1892) 8 Times L. R. 648.
(4) (1894) 10 Times L. R. 423.
(5) 12 Times L. R. 36.
(6) [1891] A. C. 325.
(7) (1877) 3 App. Cas. 193.
(8) (1878) 3 App. Cas. 1155.
(9) (1877) 2 App. Cas. 743, 775–6.
(10) 3 T. R. 51.

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Fergusson (1) is conclusive in the respondents' favour. There the action was for money had and received; here it is for a supposed breach of a duty to be careful; but in each case the sole basis of the action is the representation. Lastly, in this section "person" includes a legal as well as a natural person. That has been so decided in *Hirst* v. *West Riding Union Banking Co.* (2), and there is no ground for overruling that decision.

G. J. Talbot K.C. in reply. It is said that giving advice is not the performance of a service because it is talking and not acting. But the same argument was advanced in the Court of Session in *Haldane* v. *Donaldson* (3) and was rejected. See also *Grafton* v. *Armitage.* (4) [As to the objection that the point of law was not taken at the trial he referred to *Sutherland* v. *Thomson* (5), *Roberts* v. *Croft* (6), and *Jones* v. *Provincial Insurance Co.* (7)]

The House took time for consideration.

June 25. LORD FINLAY L.C. My Lords, this action is brought by the appellant against the respondents to recover damages, first, for negligent advice alleged to have been given to the appellant by the manager at Victoria (B.C.) of the respondents' branch there, in reliance on which the appellant invested and lost $125,000, and, secondly, for applying moneys belonging to the appellant without authority in payment of a certain mortgage. The case was tried before Darling J. with a special jury. A number of questions were left to the jury by the learned judge, and upon their answers he gave judgment for the appellant for 25,000*l.*, the equivalent of $125,000. His judgment was set aside by the Court of Appeal, who directed that judgment should be entered for the respondent bank. The decision of the Court of Appeal proceeded upon two grounds, namely, that Lord Tenterden's Act barred any action for negligence in advising, and that there was no evidence which could in point of law support the appellant's case on either head of claim. I shall deal with these points in the order in which I have mentioned them.

(1) 7 Ad. & E. 86.
(2) [1901] 2 K. B. 560.
(3) 14 S. 610.
(4) (1845) 2 C. B. 336, 342.
(5) [1906] A. C. 51, 55.
(6) (1836) 7 Car. & P. 376.
(7) (1857) 26 L. J. (C.P.) 272.

The defence under Lord Tenterden's Act was added by amendment, and after argument before Darling J. was overruled by him. It was uphe'd by the Court of Appeal. I think that Darling J.'s judgment on this point was right. The provision in Lord Tenterden's Act (9 Geo. 4, c. 14) upon which the Court of Appeal relied was s. 6. [His Lordship read the section.] The action was brought on the allegations that the respondents, as bankers, advised their customers as to Canadian investments; that the appellant was a customer; that the respondent bank, through their local manager at Victoria, advised the appellant that $125,000 might be prudently lent to the Westholme Lumber Company; that the appellant, in reliance on this advice, made the loan; that the advice was negligent, and that the money was wholly lost. In my opinion an action of this nature does not fall within s. 6 of Lord Tenterden's Act at all. The action is for the breach of the duty which it is alleged the bank had undertaken of advising the appellant, and not for misrepresentation.

The mischief which s. 6 was passed to remedy is well known. As a matter of legal history, it is common knowledge that that section was introduced to prevent the evasion of the provision of the Statute of Frauds requiring that a guarantee to be enforceable should be in writing. It was decided in 1789 in the case of *Pasley* v. *Freeman* (1) that an action would lie upon a false and fraudulent representation by which the plaintiff received damage. After this decision it became a common practice, where there was no guarantee in writing, to use the words which, but for the Statute of Frauds, would have been alleged to amount to a guarantee as evidence of a false and fraudulent representation as to the credit of the third person. We have Lord Tenterden's own authority for the statement that s. 6 was introduced in order to check this abuse. I may refer to what was said in the case of *Lyde* v. *Barnard* (2) by Gurney B., by Alderson B., by Parke B., and by Lord Abinger C.B. All of these learned judges, speaking at a time when Lord Tenterden's Act was still recent (it had been passed in 1828, only eight years before), took the view which I have above stated as to the object of the enactment. It has never before the present decision of the Court of Appeal been treated as relating to a case in which the action was based, not upon

(1) 3 T. R. 51.
(2) 1 M. & W. 101, 103, 104, 107, 114, 115, 117, 118

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Finlay L.C.

misrepresentation, but upon breach of duty arising ex contractu or quasi ex contractu.

It is, of course, always possible that the words of a statute may go beyond the object with which it was passed, and it was said in the Court of Appeal in the present case that the words of the statute are wider than this object as explained in *Lyde* v. *Barnard*. (1) I cannot agree. Sect. 6 appears to me, upon its plain meaning, to be confined to actions brought upon misrepresentations as such, and not to bar redress for failure to perform any contractual or other duty. Very many cases have been decided upon the statute, and in not one of them has the view which commended itself to the Court of Appeal been suggested as possible. It was alleged by the respondents that the section applies to actions to charge any one not only " upon " but also " by reason of " representations, and it was alleged that the words " by reason of " involved the extension of the scope of the enactment to such cases as the present. These words appear to me to have no such effect. The present action is not brought either " upon " or " by reason of " any misrepresentation. It is based upon the alleged existence of a duty to take reasonable care in advising the plaintiff, and is neither " upon " nor " by reason of " any misrepresentation.

The most significant feature in the long list of authorities cited to your Lordships in this case is that the section is uniformly treated as applying to actions for fraudulent misrepresentations only. The case of *Haslock* v. *Fergusson* (2) is no exception. That was an action for money had and received. It was alleged that the defendant had made fraudulent representations as to the credit of a purchaser who thereby obtained the goods on credit, sold them, and paid over the proceeds to the defendant, to whom she was indebted. It was claimed that the proceeds of the goods received by the defendant might be treated as money had and received to the use of the plaintiff, as he had been induced to deliver the goods by the fraud of the defendant. The case rested entirely upon the alleged fraudulent representation, and as it was not in writing it was held, and rightly held, that the action failed.

The new departure made by the decision of the Court of Appeal in the present case as to the construction of the law of s. 6 of Lord

(1) 1 M. & W. 101. (2) 7 Ad. & E. 86.

Tenterden's Act would lead to results of a somewhat startling nature. A merchant may employ at a salary a traveller to make inquiries about the standing and credit of possible customers and to report to him thereon. The traveller negligently, without inquiry or on insufficient inquiry, reports orally that a particular person may safely be trusted, and his employer acts upon his information and sustains loss thereby. In the view of the Court of Appeal the employer would have no remedy because the report falls within the terms of s. 6 of Lord Tenterden's Act. The same thing might apply in the case of an action against a solicitor for negligence in the discharge of his duty as such. Such a construction of the Act is a complete novelty. During the ninety years which have elapsed since it was passed it has always been applied only to actions upon representations as such, not to actions in which the gist of the action is breach of duty. This action appears to me not to fall within s. 6 at all, and in my opinion the judgment of the Court of Appeal on this point is erroneous.

I now proceed to consider the decision of the Court of Appeal that judgment should be entered for the respondent bank on the ground that there was no evidence in support of the appellant's case against the bank. Two separate causes of action are set out in the statement of claim. The first is for negligent advice; the second is for the application of part of the appellant's money without authority for the discharge of a mortgage held by Leiser & Co. The former of these claims is set out in the 2nd paragraph of the statement of claim as follows: "In the year 1912 the plaintiff was a customer of the defendants, and in or about the month of September, 1912, orally consulted the defendants as to investing money in Canada. The defendants by their agent and manager, one Galletly, orally advised the plaintiff to invest a sum of $125,000 in a loan on mortgage to a company known as the Westholme Lumber Company, Limited, and that the said investment was perfectly safe, and that the mortgage would be a second mortgage ranking only behind a first mortgage held by the defendants, and that the said money was required and would be used only for the purpose of completing a contract then in progress for the city of Victoria, and that with the said loan the said company would be able easily to carry out the contract without having to borrow any further

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Finlay L.C.

money." In later paragraphs it is alleged that the appellant advanced $125,000 in reliance on the respondents' advice, that the advice was negligent and unskilful, and that the money was wholly lost.

There was a great deal of discussion during the argument in your Lordships' House as to the meaning of the word "advised" in this 2nd paragraph of the statement of claim, and it was alleged that the word could properly be used only with reference to the counsel given to the appellant to invest his money, and that it would not cover the reasons for that counsel which are also set out in paragraph 2, and that these reasons must be taken to be in the nature of representations and not to form part of the advice. I am unable to agree with this view or with the suggestion that it was the duty of the judge at the trial to have explained to the jury the meaning of the words "advised" and "advice." The verb "advise" and the substantive "advice" are ordinary English words which require no judicial interpretation. They cover not merely counsel given to take a particular line of action, but also anything said at the time in support of the counsel given. When it is alleged that the defendants "advised" that the investment was perfectly safe, that the mortgage would be a second mortgage, and that the money was required and would be used only for the purpose of carrying out the contract then in progress for the city of Victoria, and that with the loan the company would be able easily to carry out the contract without having to borrow any further money, there is no inaccuracy of language. These further allegations are really reasons given for the recommendation to make the investment, and form part of the advice just as much as the counsel to make the investment itself. It is not correct to speak of the words to the effect that the mortgage would be a second mortgage, or as to the proposed use of the money, or the effect which the loan would have on the ability of the company to carry out the contract as being, as the respondents alleged, either independent representations or prophecies as to the future. They all form part of the advice given to make the investment; and the description alleged to have been given by the bank as to the nature of the investment when they recommended it forms part of the "advice."

The paragraph of the statement of claim relating to the alleged

unauthorized application of a portion of the money advanced by the plaintiff is the 5th, which runs as follows: "The defendants negligently and in breach of their duty to the plaintiff did not advance the plaintiff's said money on second mortgage or for the purpose of completing the said contract, but without any instructions or authority from the plaintiff used or allowed to be used the said money or a part thereof to pay off a mortgage given by the said company to Simon Leiser & Co., Limited, and paid the said money to the said company on the security of a fourth or fifth mortgage." This paragraph is independent of the 2nd paragraph and related to the alleged obligation of the bank to apply the appellant's money to the purposes for which it had been remitted to them by him.

The defence alleged that no advice was given to the appellant by Mr. Galletly, that Mr. Galletly gave the appellant all the information about the Westholme Lumber Company which he possessed, and that the appellant formed his own judgment on the matter and did not act on any advice from Mr. Galletly. The defence further traversed the various allegations in the statement of claim. The 7th paragraph alleged, in the alternative, that if Mr. Galletly gave advice he was acting outside the scope of his duty as manager, and the 8th paragraph further alleged that if Mr. Galletly gave the advice it was honestly given in good faith and without negligence.

The case was tried twice. The first trial was before the Lord Chief Justice, to whose summing-up I shall have occasion afterwards to refer, and resulted in the disagreement of the jury on the question of negligence. The second trial was before Darling J. The questions which he left to the jury and their answers are as follows: "(1.) Had Mr. Galletly authority as a manager of a branch of defendant bank to advise the plaintiff to invest $125,000 on mortgage to the Westholme Lumber Company?—Yes. (2.) Did Mr. Galletly advise the plaintiff: (*a*) That such investment was perfectly safe?—Yes. (*b*) That the mortgage would be a second mortgage ranking only behind the first mortgage held by the defendant bank?—Yes. (*c*) That the money was required and would be used only for the purpose of completing the water contract for the city of Victoria?—Yes. (*d*) That with such loan the Westholme Lumber Company would be easily able to carry out their contract without further borrowing?—Yes. (3.) Did the plaintiff rely on

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Finlay L.C.

such advice ?—Yes. (4.) Did he invest his money on the strength of such advice ?—Yes. (5.) Was the advice (if any) given by Mr. Galletly to the plaintiff negligently and unskilfully given by him ? —Yes. (6.) Did the defendant bank act negligently or in breach of their duty to the plaintiff in allowing a part of plaintiff's money to be used in paying off the mortgage of Leiser & Co. ?—Yes. Damages (if any).—25,000*l.*, and all securities to be returned to defendant bank."

An argument took place before Darling J. as to the effect of the findings and upon Lord Tenterden's Act, and he directed judgment to be entered for the appellant for 25,000*l.* The Court of Appeal set aside this judgment, and entered judgment for the respondents. The grounds on which the Court of Appeal arrived at this conclusion as regards the first head of claim (that for giving negligent advice) were, apart from Lord Tenterden's Act, that there was no evidence that Mr. Galletly had authority from the bank to advise the appellant to make this investment, and further that there was no evidence of a duty to the appellant on the part of the respondent bank as to advising him with reasonable skill and diligence. To appreciate these points it is necessary to refer to the history of the transaction as presented in the evidence. Mr. Galletly was in 1912, and for some years before that, the manager of the respondents' branch bank at Victoria (B.C.). The Westholme Lumber Company had an account at this branch bank and were heavily indebted to the bank, which held a mortgage for $200,000 upon lands in British Columbia, and the chattels of the company. The company were also indebted to another company closely allied with the respondent bank, the Royal Trust Company, which held another first mortgage on the same lands, and in the course of the case these two mortgages are referred to as if they were but one, constituting the first charge. The Westholme Lumber Company had in 1911 entered into a contract (referred to in the evidence as the Sooke Lake contract) with the city of Victoria to construct certain waterworks for the corporation. The correspondence shows that the financial position of the Westholme Lumber Company and the prospects of their contract with the corporation gave the bank a great deal of anxiety. Mr. Galletly was actively engaged on behalf of the bank in endeavouring to get things put on a more satisfactory footing. I may refer to

the letters of July 20, 1912, and of August 13, 1912, from Mr. Galletly to Mr. Sweeny, the superintendent of the British Columbia branches of the bank, as showing the efforts which Mr. Galletly was making on behalf of the bank to make arrangements to promote the satisfactory prosecution of the contract. These letters show that he had interviews for this purpose with Mr. Russell, of Messrs. Colman, Evans & Co., and with the city controller. In the latter of these two letters he says: "We shall have to do some wire-pulling with the several members of the council"; and he adds a postscript: "I should like to get all this straightened up before I leave." Mr. Galletly was thoroughly conversant with the position of the company, and it was largely through him that the bank acted in endeavouring to promote, in the interest of the bank, the success of the company's contract with the city. There is a long correspondence in which the superintendent, Mr. Sweeny, repeatedly impresses upon Mr. Galletly the propriety of not making further advances to the Lumber Company. On July 31, 1912, Mr. Galletly says in a letter to Mr. Sweeny: "With some $100,000 additional capital and estimates" (i.e. the certificates) "promptly paid in full by the city, the company should be able to carry out the contract satisfactorily." In all this Mr. Galletly acted as manager of the branch and in the course of his duty. In a letter of July 27, 1912, Mr. Sweeny says to Mr. Galletly: "As Cameron (the manager of the company) does not seem to be getting any forwarder with his plans for the financing of the contract, we cannot wait longer, and you will please insist upon the company accepting the offer of $200,000 for part of their Prince Rupert property, reported in your letter of the 20th instant." On September 14, 1912, Mr. Galletly, writing to the general manager at Montreal, refers to his giving over charge of the branch bank to Mr. Fraser before leaving, and adds: "I think everything will be found in good order. The Westholme Lumber Company account, which has apparently caused head office some uneasiness in the past, has, I am happy to say, been straightened up and in a few days will be in good shape through the acquisition of additional capital." This refers to the $125,000 to be advanced by the appellant. He goes on to refer to a report by a Mr. Cartwright upon the contract, and says: "It is on the strength of this report that they succeeded in obtaining the additional capital referred to . . . ."; and expresses

H. L (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Finlay L.C.

the hope "that the bank will continue to finance the company if necessary in the future as they have in the past." It was proved by Mr. Newham, the secretary of the Lumber Company, whose evidence was taken on commission, that he always kept Mr. Galletly fully informed of the financial position of the company (appendix, vol. 1, p. 136, letters D and E), and that the bank knew that the Westholme Lumber Company, to continue, must have money from some source (vol. 1, p. 226, C to G). It was in September, 1912, that the appellant first came to Victoria (B.C.). He had been at Montreal in 1911, in July, as the guest of Sir Edward Clouston, the general manager of the respondent bank, with whom he had some discussion with regard to investment of money in Canada, and Sir Edward gave him the following letter: "Head Office, Bank of Montreal, Montreal, July 6, 1911. The Managers, Bank of Montreal. Dear Sirs,—I take pleasure in introducing to you Captain Banbury, of London, England, who is visiting this country on pleasure. Should he apply to you for assistance or advice you will be good enough to place yourselves at his disposal. Yours faithfully, E. S. Clouston, General Manager." This letter was not used by the appellant in 1911, but in July, 1912, he again visited Canada, stayed with Sir Edward Clouston, and again discussed the subject of investment in Canada. Sir Edward asked the appellant whether he wanted a letter, and the appellant informed him that he had the letter given him in 1911, which Sir Edward said would do as well. In July, 1912, the appellant opened an account with the respondent bank in Montreal, and also a deposit and current account with the Vernon branch. He went on to Victoria, and on September 7 he went to the branch bank there and saw Mr. Galletly, to whom he showed Sir Edward Clouston's letter of introduction. He asked Mr. Galletly whether he could put him on to some good "agreements for sale." Mr. Galletly said he did not know of any, but would try to find some. The evidence of the appellant proceeds as follows:—"(A.) Then he said: 'In the meantime I should like to put before you an industrial proposition.' I answered that I was afraid that they were of a speculative nature, and therefore did not interest me. Mr. Galletly told me that there was nothing speculative about the proposition which he had in his mind. He then proceeded to tell me about the contract which the Westholme Lumber Company

had secured for supplying the city of Victoria with water. After discussing it for a little while I asked him what the security would be, and he said he did not think the company would give me any security, but that they would give me a good rate of interest—a high rate of interest I think he said—and a large share of the profits. I told him that I could not entertain the proposal, as I could not afford to lend money without security. (Q.) Was anything said about the bank's position with regard to the Lumber Company? (A.) Yes, he told me that the bank and the Royal Trust Company, I think, had lent them money on this contract, or in connection with the contract. (Q.) Do you remember whether anything was said about the Cartwright report at that interview? (A.) I am not absolutely certain about that, but I rather think it was mentioned. I think Mr. Galletly said that an engineer had been asked to report upon it. Whether I actually saw it or not I should not like to say, but I rather think it was mentioned. (Q.) Then you said you would not do it without security. What happened next? (A.) Mr. Galletly said that he would try and find some agreements for sale for me, and asked me to call again on Monday. (Q.) On the Monday, that is September 9, did you in fact go in and see Mr. Galletly again? (A.) I did. (Q.) Will you tell us in your own words what happened at that interview? (A.) When I saw Mr. Galletly I asked him if he had found any agreements for sale for me. He told me he had not been able to do that, but that he had seen the Westholme Lumber Company, and that they now offered me a second mortgage. The mortgage was to be secured on the same security as that held by the bank. I think Mr. Galletly explained to me that the Royal Trust and the bank were so closely allied that their two mortgages could be considered as one, and mine was to be the second of those two. I asked him if the security would be sufficient for both loans, and he said it would be ample. I think the amount of the estimated securities was $470,000. (*Mr. Justice Darling.*) The value of the two? (A.) No, my Lord, the value of the securities held by the bank as security for the loan. In the bank's opinion this amounted to $470,000 or something like that. (*Mr. Douglas Hogg.*) What happened next when he told you that? (A.) I asked him if the company with my loan would have sufficient funds to reap the full advantage of the contract, and he told me they would. A little

H. L. (E.) 1918 — BANBURY v. BANK OF MONTREAL. — Lord Finlay L.C.

later he brought in Mr. Cameron, who was the representative of the Westholme Lumber Company. (Q.) He was the president of the Westholme Lumber Company? (A.) Yes. He brought in Mr. Cameron from the outer office of the bank and introduced me to him. Mr. Cameron practically confirmed what Mr. Galletly had already told me, and he went further and said that if I made the loan the company would be able to secure a bond with an insurance company. As I understood him, the effect of that would be that the city would then release very much more of the so-called hold-back that they now retained. I think the figures were 45 down to 15 per cent., and that would give the company so much more working capital. (Q.) What was said next? Was anything said about your lending any further capital beyond the 25,000*l.*? (A.) Yes. Mr. Cameron confirmed what Mr. Galletly said. When I asked Mr. Cameron if that would be enough money I said I could not produce any more. (*Mr. Justice Darling.*) Any more than the 25,000*l.*? (A.) Yes, my Lord, and he said he thought it would be enough. (Q.) Who said he thought it would be enough? (A.) Mr. Cameron. (*Mr. Douglas Hogg.*) What was said next? Do you remember? (A.) I do not know that I can remember in the exact order what happened. (Q.) Do you remember anything more that was said at that interview with regard to this investment? Was anything said about the matter in the hands of the city? (A.) Yes. I have explained that the company were to get more working capital by the issue of an insurance bond. Then I asked if the city were capable of paying for the contract, and I was told both by Mr. Galletly and by Mr. Cameron that the money for the payment of the contract was on deposit at the city bank of which I have forgotten the name. (Q.) The Bank of British North America? (A.) And that it would be used for no other purpose than for the paying of this water contract." On September 10 the appellant called at the bank again. The following is an extract from his evidence as to that day's conversation:—" (Q.) Did you then go and see Mr. Galletly again? (A.) Yes. I went and saw Mr. Galletly again, and I had some more conversation with him. (Q.) Will you tell us what Mr. Galletly told you on this occasion about this investment? (A.) There were two extra things. I remember one was that if he were not the servant of the bank he would put as much as he could of his own money in

this thing, and the other was that Sir Thomas Shaughnessy, who I believe was a director of the bank, and also connected with the Pacific Railway, was expected in some ten days, or something of that kind, and he thought that if I did not take this offer Sir Thomas Shaughnessy would." On the 11th the appellant went to the bank again and told Mr. Galletly that he had decided to invest his money in the Westholme Lumber Company, giving his reasons for so doing. With Mr. Galletly's assistance he drew up the memorandum, of which the following is a copy :—" Cecil Banbury, retired army captain, agrees to lend the Westholme Lumber Company, Ltd., $125,000. The company agree to pay 8½% interest and 12½% of the profit on the Sooke water supply proposition and to use the loan solely for this proposition. The interest to be paid quarterly into Captain Banbury's a/c at the Bank of Montreal, Victoria. The co. agree to give as security a second mortgage (similar to the one held by the bank) on all the securities of the co. according to the schedule which amounted to about $475,000." The appellant's evidence proceeds : " (Q.) Then was anything arranged about the mortgage, the document that had to be signed ? (A.) I asked if I should have the mortgage to sign, if they would send it on to me to sign, and Mr. Galletly told me there would be nothing for me to sign. I left the business in his hands and he was to collect the mortgage for me. I was to pay the money into my account. (*Mr. Justice Darling.*) He was to collect the mortgage for you, was he ? (A.) Yes, my Lord—I mean the actual document ; and I was to pay the money into my account at the bank at Montreal. (Q.) The 25,000*l.* ? (A.) Yes, my Lord, which Mr. Galletly was going to transfer to the Westholme Lumber Company on receiving the mortgage. The interest was to be paid into my account at the Bank of Montreal." The appellant left Victoria the next morning, and about October 2 he sent to the respondent bank at Victoria the 25,000*l.*, and the bank had the whole conduct of the investment of this money. After his arrival in England the appellant received from Mr. Fraser (whom he had seen along with Mr. Galletly in his office at Victoria, and who had by this time succeeded Mr. Galletly as manager there) the mortgage to him from the Lumber Company and the land certificate. The mortgage was to secure the 25,000*l.*, and contained the following clause :—" The mortgagors shall use the said sum of

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Finlay L.C.

$125,000 for no other purpose than for expenses incurred in the construction of the said water supply." The land certificate contained a reference to the fact that on the title there appeared an application for registration by Simon Leiser & Co. The appellant also received a letter of November 9, 1912, from Mr. Fraser in which he mentioned the fact that after receiving the appellant's loan Leiser's mortgage for $25,000 had been discharged and went on to say that at that time they thought that with the appellant's money they would have ample funds for carrying on the contract work, but that he feared the company had seriously miscalculated the capital required for their undertaking. The appellant replied to this letter in a letter dated November 23, in which he said : " I am more than surprised to hear that $25,000 of my money should have been used to pay off Simon Leiser & Co., Limited, and that that company had a prior charge. I saw this on the mortgage when I received it but I never heard of them before then, and I was most distinctly given to understand that I had a second mortgage and that the only prior claim was that of the Bank of Montreal. I am extremely anxious to know why the city has no funds, because, as I stated in my last letter, I understood that the necessary funds were deposited with the bank and could be used for no other purpose. As far as I can see, there is nothing left for me to do but to foreclose, and, if you think this step is advisable, I should be extremely obliged to you if you would have this done for me if my interest is not paid at the right time." In 1913 the appellant received from the respondent bank their circular of March 7, 1913, with reference to the opening of a branch in the West End of London, which concluded with the following announcement : " In accordance with our long-established custom, it would afford our West End office pleasure to supply our Canadian and other friends with any advice or information in its power." There were various communications and interviews, and ultimately in the month of December, 1913, the appellant's solicitors wrote to the respondent bank claiming repayment of the $125,000 which had been advanced on Mr. Galletly's advice. The bank repudiated all liability, and on March 10, 1914, the present action was brought. The appellant was cross-examined with the view of showing that he had been led to make the investment by the report of Mr. Cartwright, dated September 7, 1912, giving a favourable

account of the prospects of the contract, but, as the jury have found that the appellant acted in reliance on Mr. Galletly's advice, it is unnecessary to go into any details on this point. The appellant stated that to the best of his belief he did not read Mr. Cartwright's report till after he had lent the money, and that in doing this he had relied on the bank, and the jury believed him.

For the respondent bank Sir F. W. Taylor, their general manager, was called. During his evidence he was asked a question as to the authority of bank managers to advise on behalf of the bank with regard to investments, and, on objection to the question, a discussion arose in the course of which Mr. Gordon Hewart, the leading counsel for the appellant, put the case in this way: (*Mr. Gordon Hewart.*) "I submit that the question whether they have authority is a question which in each case has got to be determined upon the circumstances of the case. The word 'authority,' in other words, is an ambiguous word which may refer to an express authority." (*Mr. Justice Darling.*) "Mr. Raeburn is sure to cut it up into express or general. He will first of all ask if they have general authority." (*Mr. Gordon Hewart.*) "I should submit that the proper question is as to the express authority, and it is for the gentlemen of the jury to determine upon the facts of the case, in my submission, what their authority in fact was." Darling J. ruled that the question might be asked whether the bank managers had any general authority to advise, and in answer to the question "Have your branch managers any general authority to advise on behalf of the bank as to investments?" the witness replied "None whatever." He suggested that Sir Edward Clouston's letter was of a social nature and might have led to shooting or fishing being offered. In cross-examination the witness drew a distinction between bringing schemes to the notice of persons and recommending them. He said that the latter would be beyond the province of a bank manager, while the former would be within it. The respondent bank also called under the commission to Canada Mr. Montizambert, who had been for many years one of their managers. He stated that a manager in giving advice would be acting for himself and not for the bank, and said that if Captain Banbury had asked him about the Westholme contract he would have told him to take the advice of some lawyer or some one conversant with the business. The respondents also called under

H. L. (E.)
1918
BANBURY
v.
BANK OF MONTREAL.
Lord Finlay L.C.

the commission Mr. Cartwright, the gentleman who had made the report above adverted to, on which, it was suggested by the bank, that the plaintiff had really relied in deciding to make the investment. He stated (vol. 1, p. 625) that he had estimated the additional capital which the Westholme Lumber Company would want at $98,000, that they needed additional capital principally for putting in the steel pipe-line and the concrete pipe-line; and further he said (p. 449), in answer to a question whether the contractor had an insufficient plant and was getting on too slowly, "That is what he needed more capital for." This evidence was certainly for the consideration of the jury in deciding whether it was not essential that the appellant's loan should be spent in acquiring the necessary plant for the prosecution of the contract. I believe that I have now referred to the most material parts of the evidence and documents, except on the head of damages, which I reserve for separate consideration. Mr. Galletly and Sir Edward Clouston had both died before the case came on.

The Court of Appeal entered judgment for the respondent bank, dismissing the action on the grounds that Mr. Galletly had no authority to bind the bank by advising the appellant, and that the bank owed no duty to the appellant that reasonable care should be taken in advising him. If the bank owed a duty to the appellant to advise with due care, there was clearly evidence on which the jury might find negligence. Scrutton L.J. says so in terms, and there is nothing to the contrary in the judgments of the other members of the Court of Appeal. The two points on which the Court of Appeal proceeded in finding that the bank owed no duty to the appellant are a good deal connected, and were so dealt with by the Lord Chief Justice in his summing-up on the first trial, in which he left to the jury the question whether Mr. Galletly advised the plaintiff and the question whether the plaintiff relied on that advice in making the investment. It is beyond dispute that in what he was doing generally with reference to the affairs of the Westholme Lumber Company in 1912 Mr. Galletly was in the strictest sense acting in the course of his employment as bank manager, and that the bank would be liable for his actions. But the contention of the bank is that his authority as bank manager stopped short of power to give advice as to investments. The limits of a banker's business cannot be laid

down as a matter of law. The nature of such business is a question of fact on which the jury are entitled to have regard to their own knowledge of business, and to the evidence in the particular case, and it is from that point of view that the present case must be considered. It cannot be treated as if it were a matter of pure law.

The appellant came to Mr. Galletly bringing with him the letter of introduction from Sir Edward Clouston, dated July 6, 1911. It has not been contended before us that that letter should not have been left to the jury, and no such contention was possible. Sir Edward Clouston was the general manager of the bank, and on neither of the trials was there any question raised as to his authority, and no such point is raised now. The question of the weight to be attributed to the letter was for the jury. Counsel for the appellant and for the respondents respectively put the views of their clients upon the construction and effect of this letter before the jury. The respondents contended that the letter pointed merely to assistance and advice of a social character, the appellant that the advice to be given was not so limited and might extend to matters of business. It is to be observed that neither the appellant nor Mr. Galletly treated the letter as asking for assistance or advice merely of a social character. When it was presented the appellant proceeded to ask, and Mr. Galletly to give, advice of a business character as to investments. The effect of the letter on this point was for the jury, as laid down by Lord Davey in delivering the judgment of the Privy Council in *Bank of New Zealand* v. *Simpson*. (1) Even if this letter had stood by itself, it would, in my opinion, have been impossible to withdraw the case from the jury, but it must also be taken in connection with the whole course of business of the bank with regard to the Westholme Lumber Company. The letter, of course, would not be read by any bank manager as authorizing him to give advice on any matter of business whatever, but if the advice related to a matter which had passed through the manager's hands in the course of his business, and with which he was thoroughly conversant, the letter did authorize him to give advice to the appellant upon it, of course subject to the limitations which I shall presently point out as to interest and information obtained in confidence.

(1) [1900] A. C. 182, 189.

H. L. (E.)
1918
BANBURY
v.
BANK OF MONTREAL.
Lord Finlay L.C.

While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, it appears to me to be clear that there may be occasions when advice may be given by a banker as such and in the course of his business. The circular of March 7, 1913, quoted above showed that it had been the long-established custom of this bank to supply Canadian and other friends with any advice or information in its power. If a question arises as to investments with regard to which a banker has special means of knowledge, it will not be out of the ordinary course of business for the banker to advise a customer who asks for his counsel. Of course, if the banker's familiarity with the subject arises from the fact that he has himself a pecuniary interest in it, he would be bound in advising the customer to make full disclosure to him of this circumstance, but as long as the full disclosure is made he may, if he pleases, advise, and in doing so he would not be stepping outside the business of a banker ; and it may be noted in passing that the case made by the bank at the trial was that Mr. Galletly had told the appellant everything. It is possible that the banker may be in possession of information obtained in confidence from other customers which he is not at liberty to disclose, and under such circumstances it might be his duty to refuse to advise, as his hands would be tied in regard to the material parts of the transaction on which he was consulted. Subject to these considerations a banker may, as such, give advice on investments to a customer who consults him, or, indeed, to any one who comes to him for advice, and whom he chooses to advise. If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently. The extent of the obligation to care in such cases is well stated in a passage of the Lord Chief Justice's summing-up on the first trial. It is as follows : " Now negligence in a case of this kind involves a breach of duty. There can be no negligence in law unless it is the failure or omission to perform or discharge some duty which is imposed upon you. If there is a duty, then the defendants' servant would be bound to discharge that duty with ordinary reasonable care and skill such as a man would have the right to expect in the circumstances. What I mean by that is that, supposing a bank manager does undertake the duty of giving you advice (which is the

simplest way of putting this part of the proposition), it does not mean that for one moment he commits a breach of that duty if by the exercise of some extraordinary skill or care he might have discovered something which he did not discover, and which might have affected the advice he had given. But, on the other hand, if a bank manager undertakes to advise you, you are entitled to that care and skill which you would ordinarily expect from a man in that position. The question in this case is whether, in the circumstances that have been proved before you, you are satisfied that the defendants' manager failed to exercise that care and skill in the advice that he gave to the plaintiff if he gave it." Exactly the same considerations as to giving advice apply to the case of the manager of a branch bank with regard to the business which is immediately under his care as manager. It is noteworthy that throughout the correspondence which followed on the appellant's complaint against the bank when the loss occurred the position taken up by the bank was a denial that Mr. Galletly had in fact advised. It was never suggested in this correspondence that it was beyond the scope of his duties to advise the appellant as alleged. It is a fallacy to argue that because the bank was interested in the matter the manager could not on behalf of the bank advise. That circumstance threw upon him the duty of making a full disclosure of the interest of his employers. If he failed to do so, he would be guilty of a breach of duty to his employers, but this would not prevent liability of the employer to those to whom negligent advice had been given. His employers would be liable on the familiar principle on which the employers of a chauffeur is liable for his negligence in driving, though the negligence is a breach of duty to the employer and contrary to his instructions.

It was strenuously contended on behalf of the bank that the matter on which Mr. Galletly was said to have advised the appellant was as to the sufficiency of the mortgage which it was proposed he should take, and that this was a matter, not for a banker, but for a lawyer and a valuer. This argument involves a total misconception of the nature of the transaction. The prospects of the success of the contract for the construction of the waterworks were vital to the question of the propriety of the investment. Not only did the prospects of the receipt of the 12½ per cent. of the profits on the

H. I. (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Finlay L.C.

contract depend entirely upon its success, but the success or failure of the contract would vitally affect the question of the adequacy of the mortgage security itself for the principal and interest, inasmuch as, if the contract were a failure, the contractor would be unable to pay the bank and the Trust Company, and their first mortgages would have to be enforced, with the effect of seriously impairing the value of the appellant's second mortgage. The bank then contended through their counsel that if the appellant wanted advice as to the prospects of the contract for the waterworks he should have consulted an engineer. This suggestion hardly bears examination. Upon the financial aspects of the contract a banker who had been financing the contractor and was intimately acquainted with all the conditions of the problem would be a much better adviser than an engineer. The jury accepted the evidence that the bank, through Mr. Galletly, undertook to advise the appellant, and he was eminently qualified to do so from the attention he had paid to the contract in the interests of the bank. These considerations were in my opinion quite enough to render it necessary to leave to the jury the question whether Mr. Galletly was acting in the course of his employment in giving the advice which the jury have found he gave. The case made for the bank at the trial was that Mr. Galletly had not advised at all, but had simply brought the matter to the attention of the appellant and left him to form his own conclusions. The jury accepted the evidence of the appellant on this question of fact, and it is not questioned that there was ample evidence on which they might come to that conclusion. No submission was made to Darling J. that the case should be stopped on the ground that there was no evidence that Mr. Galletly was acting in the course of his employment, or that he had no authority to bind the bank in the matter. Nor, indeed, was any such submission made on the first trial before the Lord Chief Justice. Scrutton L.J. is mistaken when he says (vol. 2, p. 758, B) that the defendants on the first trial submitted that there was no evidence of authority. What the defendants did submit was that there was no evidence of negligence, and after the first trial had proved abortive owing to the inability of the jury to agree on the question of negligence counsel for the bank applied to the Lord Chief Justice to have judgment entered for the bank on the ground that there was no evidence of negligence in

advising the plaintiff. The question was fully argued on March 16, 1916, and he said that it was a question for the jury and refused to enter judgment for the defendants. In the course of his judgment upon this point he made the following observations: "The effect of making the submission to me this morning is, no doubt, that it puts the defendants in the position, if they desire it, of taking the opinion of the Court of Appeal upon the point, but I left it for the jury, reserving it for future discussion." (Typed copy of Proceedings of March 16, 1916, pp. 30 and 31.)

It was argued on behalf of the respondents that, even if authority from the bank to Mr. Galletly was assumed, as the advice to be given was gratuitous no liability in law could follow from an undertaking to give such gratuitous advice. It is beyond dispute that on a gratuitous bailment the bailee may be made liable for want of ordinary care. But it was said that the consideration there consists in his being entrusted with the property of another. The consideration really is the confidence reposed in the person who undertakes the duty. He need not undertake it at all, but if he does he must exercise due care in discharging it. This consideration applies just as much to the case of gratuitous advice as to that of gratuitous bailment. Indeed, it was admitted in argument, or at least it was not denied, that a physician who undertakes to treat a patient gratuitously would be liable for negligence, but it was sought to distinguish such a case on the ground of the important and responsible public duty which such a profession involves. There is in point of law no difference between the case of advice given by a physician and advice given by a solicitor or banker in the course of his business. By undertaking to advise he makes himself liable for failing to exercise due care in the discharge of his duty to the person who has trusted him, and the fact that he undertook it gratuitously is irrelevant. But in truth it is a mistake to treat the present case as one merely of advice or of merely gratuitous advice. The bank was to undertake the receipt and application of the money if advanced, and this, apart altogether from the bankers' interest in the success of the contract, shows that the whole transaction was a purely business one. It cannot be put in the same category as advice given out of charity or benevolence. For the reasons I have given I think it clear that, even in such cases of charity or

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Finlay L.C.

benevolence, failure to exercise due care would entail liability on the person who has voluntarily undertaken the duty. But from beginning to end this was a business transaction on the part of the bank, as was pointed out by the Lord Chief Justice in his summing-up on the first trial. For these reasons it appears to me that the case was properly left to the jury, and that the decision of the Court of Appeal entering judgment for the respondents was erroneous.

There is, however, another question of great importance with reference to the conduct of cases tried with juries, and that is whether this point was open to the respondents on appeal, having regard to the conduct of the trial. The only point of law taken at the trial before Darling J. was that the action was barred by Lord Tenterden's Act. It was not submitted that there was no evidence in point of law of Mr. Galletly's authority, or of the advice having been given in the course of his employment, and Darling J. pointedly called attention to this in his summing-up (appendix, p. 727, B, C). Indeed, Sir John Simon, who appeared for the bank at the trial, in the course of a discussion at the end of the plaintiff's case on July 20, 1916, said before Darling J.: "If your Lordship will kindly take the pleadings as they now stand—in the first place I ask your Lordship to observe that the statement of claim is framed in two ways—so far as the first way is concerned, alleging that there has been reliance upon the assurance of Mr. Galletly as representing the bank as to the credit and standing of this Westholme Lumber Company. That, no doubt, is a plea which, as it stands, on the evidence, subject to one point, may have to go to the jury." Sir John Simon then went on to make a submission as to the Leiser mortgage, adding that his submission had nothing to do with the claim for negligence and breach of duty while acting as bankers and advisers for the plaintiff, and a further submission as to Lord Tenterden's Act, which he claimed was fatal to the case made for negligence in advising. The one point on which he made reservation, while admitting that the claim for negligence in advising may have to go to the jury, is obviously the point as to Lord Tenterden's Act, so that not merely was there an entire omission to raise the point now sought to be made, but there was an admission that, subject to the question of Lord Tenterden's Act, the question of negligence might have to go to the jury. Your Lordships have to deal not merely

with the failure to raise the point now made, but with the express admission to which I have just called attention. But in truth the conduct of a case speaks as clearly as words. The question is not one of any technicality, but of consistency between the line taken at the trial and that in the Court of Appeal. The position of the respondents upon this point seems to be as hopeless as that of a defendant who at the trial, in the belief it might help him to get a verdict, stated that he did not raise any objection in point of law to the sufficiency of the evidence, and wished to take the opinion of the jury, and then tried to argue in the Court of Appeal that he should have judgment as the evidence was not sufficient in law.

The course of practice has always been regarded as well settled that points of law alleged to entitle the party raising them to verdict or judgment must be made at the trial, and that if they are not then made they cannot be raised afterwards. This practice is illustrated by what took place on the first trial of this case before the Lord Chief Justice, when the counsel for the bank submitted that there was no evidence of negligence, and this was reserved for argument, and by the observation of the Lord Chief Justice which I have above quoted that what had taken place put the bank in a position to take the opinion of the Court of Appeal upon the point. The rule was applied in *Graham* v. *Huddersfield Corporation.* (1) That was a case in which an action had been brought by a contractor against the corporation to recover payment for sewerage works. The action was tried before Mathew J. and a special jury. The plaintiff had not received any certificate under the contract, but the jury gave a verdict for the plaintiff on the issue of an alleged parol contract with the health committee on behalf of the corporation. After the verdict counsel for the corporation submitted to Mathew J. that judgment should be entered for them on the grounds that the contract was not under seal, and therefore not binding on the corporation, and that under s. 200 of the Public Health Act, 1875, the committee had no power to bind the corporation by any such contract. Mathew J. refused the application on the ground that the point had not been taken before the verdict. The corporation appealed to the Court of Appeal, and the case was heard there by Lord Esher M.R., Lopes L.J., and Kay L.J. Lord Esher said, in

(1) 12 Times L. R. 36, 37.

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Finlay L.C.

giving judgment, "that the objection that the defendants had taken their point too late must prevail. Whether they could have waived the point before they came into Court it was not necessary to determine. But they had waived the point in Court during the trial by allowing the case to proceed till verdict on the basis that the only issue was whether there had been a promise in fact to pay for this work. In his opinion it was not open to them to take the point now, and the application must be dismissed." Lopes L.J. and Kay L.J. concurred on the ground that the point had been waived and that it would be too late to raise it after verdict. Lord Esher and Mathew J. were judges of the highest authority on such matters, and the decision is, in my opinion, clearly right and in conformity with settled practice. There may be cases in which by consent of counsel on both sides, express or implied, a different practice may be pursued, especially nowadays in the Commercial Court, but apart from consent the law is clear. I may add that in the present case it is plain that the course taken by counsel for the Bank of Montreal was taken deliberately as being in their opinion the most politic. I may mention also in this connection the case of *Jones* v. *Provincial Insurance Co.* (1), where the Court refused to allow to be argued points of law which had not been taken at the trial.

The following cases, though not turning upon the same point, also illustrate the principle which lies behind the rule of practice now in question. In *Macdougall* v. *Knight* (2) Lord Halsbury L.C., after setting out what Huddleston B. at the trial had stated as to the questions which he proposed to leave to the jury, said: "Now I think it was the duty of those who are suggesting that other questions ought to have been asked and other issues raised to have intervened at this point, and to have requested Baron Huddleston definitely and distinctly to put the questions that they now insist ought to have been submitted to the jury. But nothing of the sort was done. The parties took their chance of what the jury would do, and I think nothing could be more mischievous than to allow litigants to raise new questions when, under such circumstances, the jury have decided against them. If such a course were permitted no end could possibly be found for litigation." And in *Nevill* v. *Fine*

(1) 26 L. J. (C.P.) 272. (2) 14 App. Cas. 194, 199.

Art and General Insurance Co. (1) Lord Halsbury used similar language with regard to complaints of non-direction by the judge or his not leaving a question to the jury when the point had not been raised. *Seaton* v. *Burnand* (2) may also be referred to upon this point. The respondents cited cases in which it has been laid down that it is the duty of the judge to rule if there is no evidence. These cases have no bearing upon the present question. In *Ryder* v. *Wombwell* (3), in *Metropolitan Ry. Co.* v. *Jackson* (4), and in *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (5), which were the cases relied on by the respondents, the objection was raised at the trial, as appears on the face of the reports. The decisions relate to the duty of the judge when the point is taken as it had been in these cases, and do not touch the question whether it can be raised for the first time when the trial is over.

It is, of course, within the power of the presiding judge at the trial, if it occurs to him that there is a point of law which is being overlooked by the counsel in the case, to call their attention to it, and if after argument he thinks that it concludes the case, so to decide. This is a power which should be exercised sparingly, as the judge would no doubt think it right to abstain from interfering with the conduct of the case by experienced counsel in the manner which they considered most in the interests of their clients. It would be exercised when it is apparent that, owing to inexperience or some accident, a point material to be considered has escaped the notice of counsel. When a point had been so raised on the initiation of the judge at the trial it would, of course, be open on appeal. At the trial further evidence may be called to remedy the supposed defect. It is a novel proposition that when the trial is over a Court of Appeal may be invited by the counsel on one side or the other to enter judgment on a point which they deliberately did not put forward at the trial. It was suggested by the respondents that in such a case it would be the duty of the Court of Appeal to ascertain whether the defect might have been cured by further evidence, and only in this case to refuse to entertain the objection. This would be most inconvenient, and indeed impracticable. The

(1) [1897] A. C. 68, 76.
(2) [1900] A. C. 135, 143, 145.
(3) (1868) L. R. 4 Ex. 32.
(4) L. R. 10 C. P. 49; 3 App. Cas. 193.
(5) 3 App. Cas. 1155.

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Finlay L.C.

introduction of such a practice might encourage unscrupulous litigants to abstain from raising a point at the trial because they thought this would improve their chances with the jury and then to bring it forward in the Court of Appeal in the hope that the other side might fail in satisfying the Court of Appeal that evidence might have been available to meet the point if it had been taken at the trial. It is at the trial that such points of evidence should be dealt with. It is then that further evidence to remedy the suggested flaw may be tendered if it exists, and an adjournment may be obtained for the purpose. That is the time to test the existence of further evidence. For this reason the law of practice has provided that such a point cannot be raised on a motion for a new trial if it had not been taken, and this applies a fortiori to an attempt to get judgment entered. The rule is intended to secure the fair conduct of jury trials. Any relaxation, such as the respondents contended for, would throw upon the Court of Appeal the duty of entering upon a very difficult, and in many cases impossible, inquiry as to what evidence there might have been. I should add that it is in my opinion far from clear that further evidence as to the practice of bankers as to advising could not have been obtained. This point is not, in my opinion, affected by the Rules under the Judicature Act. Several rules have been referred to on behalf of the respondents. Order XXXIX., r. 6, provides that a new trial shall not be granted because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned. This has no bearing on the point now under discussion. It is the duty of the judge to put the proper questions to the jury, and this rule merely provides that if there was an omission to do so on a point to which his attention had not been called, a new trial should not be granted for that reason, unless there had been thereby occasioned some substantial wrong or miscarriage. Order XL., r. 10, was also cited, but it also appears to me to be irrelevant. It was, however, contended that Order LVIII., r. 4, carried the matter further. Among other provisions that rule contains the following: "The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such

further or other order as the case may require." The effect of this part of the rule is simply that when the Court of Appeal is dealing with an application for a new trial it may, instead of ordering a new trial, direct judgment to be entered if, in the opinion of the Court, there is no evidence in support of the case of the plaintiff or defendant, as the case may be. This rule does not touch the question of the effect of omission to take the point at the trial. It merely provides that, to save expense, instead of granting a new trial, if it is clear that the judge upon the new trial would be bound in point of law to enter judgment for the plaintiff or defendant, as the case may be, the Court of Appeal may do so itself, but there are no words to show that the necessity of having raised this point at the trial is dispensed with. The respondents failed to produce any authority for this proposition. In *Quilter* v. *Mapleson* (1), where the action was to enforce forfeiture of a lease for breach of a covenant, the appeal against judgment for the plaintiff did not come on for hearing until s. 14 of the Conveyancing Act, 1881, providing for relief in such cases, had come into operation. The Court of Appeal held that they could give relief under it in virtue of Order LVIII., r. 4. The point could not have been taken at the trial, as the statute had not then come into operation. This case obviously does not affect the question whether a point which was open at the trial can be taken for the first time in the Court of Appeal under this rule. In *Millar* v. *Toulmin* (2) it does not appear from the report that there had been any omission to take the point at the trial. The observations made in the Court of Appeal in that case upon Order LVIII., r. 4, therefore are not relevant to the present case, and their authority has been shaken by what was said by Lord Halsbury L.C. in the House of Lords when the judgment of the Court of Appeal was reversed. In the case of *Allcock* v. *Hall* (3) Order LVIII., r. 4, was also considered, and under it judgment was entered for the defendant. Here, again, it does not appear that there had been an omission to take the point at the trial, and the judgment does not deal with the effect of such a failure.

It must be remembered that in a jury case the verdict was in early days final, subject only to the ancient writ of attaint against

(1) (1882) 9 Q. B. D. 672.
(2) (1886) 17 Q. B. D. 603; (1887) 12 App. Cas. 746.
(3) [1891] 1 Q. B. 444.

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Finlay L.C.

the jury, which has been obsolete for many centuries (see Blackstone's Commentaries, bk. 3, c. 25), while matters appearing on the record might form the subject of a motion to arrest judgment or to enter judgment non obstante veredicto. In the seventeenth century the practice of granting new trials came into vogue. But no one was allowed to apply for a new trial on a point of law unless he had taken it at the trial. An application for a new trial on the ground that the verdict was against the weight of evidence was, of course, a different matter altogether, and on the hearing of a rule for a new trial upon this ground it is now open to the Court of Appeal to enter judgment on the ground that there was no evidence, always subject to the consideration that the point must have been taken at the trial, as there is nothing in the rule to supersede the existing law upon the subject.

I should add that there is a vital distinction between the cases in which judgment may be entered on the ground that there was no evidence and those in which a new trial may be ordered on the ground that the verdict was against the weight of evidence. Judgment can be entered only if there was in point of law no evidence fit to be left to the jury. If there was any evidence, however plain it may appear on the probabilities of the case or the balance of evidence that the jury went wrong, a new trial only can be ordered. This distinction is not impaired in the slightest degree by the rule now well established that a verdict will not be disturbed unless it be one which the jury could not reasonably find. Judgment can never be entered on the ground that the verdict was against evidence. The respondents urged that this point was not taken by the plaintiff in the Court of Appeal when the bank asked for a new trial, or for judgment on points of law taken at the trial. The shorthand notes of the argument in the Court of Appeal were, so far as material on this point, read to your Lordships. They show that while no preliminary objection was made by the plaintiff's counsel, yet when he came to deal with each ground of appeal he, in terms, called the attention of the Court to the fact that the point had not been taken at the trial. It is true that he did not expressly say that for that reason he objected to the Court's going into the question, and the counsel for the bank suggested that he referred to the fact merely as detracting from the weight to be

attached to the argument. But I think that when on each such ground the plaintiff pointedly drew the attention of the Court to the fact that the matter had not been raised at the trial, it threw upon the Court the duty of considering whether the point was open to the bank on appeal, and it is impossible to say that the conduct of the plaintiff's counsel in the Court of Appeal amounted to a waiver of the objection which we are now considering. The Canadian Bank Act, 1906 (Revised Statutes of Canada, c. 29), was referred to by the respondents. I do not think that this Act contains anything which for the present purpose is material. The Master of the Rolls said in the Court of Appeal that the bank, according to the law of Canada, cannot advise as to investment, but there is nothing in the Act to support this view. Sect. 76 empowers the bank to (*d*) "engage in and carry on such business generally as appertains to the business of banking." This leaves open the question whether advising upon certain occasions may form part of the business of banking. A number of sections in the Act were read to your Lordships, among others ss. 79, 80, 89, and 146, but none of them have any real bearing upon the case now before your Lordships.

The claim in paragraph 5 of the statement of claim for the payment of the Leiser mortgage is of secondary importance. It is merely a claim on another and independent ground for a portion of the $125,000 claimed as damages for negligent advice; it does not claim any sum in addition to the $125,000. This question was left to the jury upon the first trial by the Lord Chief Justice in a somewhat elaborate summing-up (pp. 66 to 71 of the typed copy of the summing-up on first trial). He put two questions to the jury upon this: (1.) Did the bank by paying the Leiser mortgage with part of the money of the plaintiff act contrary to the plaintiff's instructions? and (2.) Did the plaintiff acquiesce in this action of the bank? The summing-up of Darling J. on the second trial is on p. 720 of the appendix. The question which he left to the jury was this: "Did the defendant bank act negligently or in breach of their duty to the plaintiff in allowing a part of plaintiff's money to be used in paying off the mortgage to Leiser & Co.?"

It is now said that these questions should not have been left to the jury at all on the ground that there was no evidence of any mandate from the appellant which was violated by the payment.

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Finlay L.C.

It is extraordinary that on neither of the trials was there any submission on this point. Indeed, on the second trial Sir John Simon, for the bank, told the judge that an issue on which he might have to direct the jury was whether the Simon Leiser mortgage was mentioned to the appellant (appendix, p. 576, E), and in making a submission at the end of the plaintiff's case he based himself, so far as this point is concerned, solely on alleged ratification of the payment. At both trials the respondents elected to rest their case upon the question whether the Leiser mortgage was mentioned to the appellant at the time when he had his interviews with Mr. Galletly, and upon the question whether if the payment was unauthorized in the first instance the appellant afterwards ratified it. Upon this the jury found for the plaintiff, the present appellant. Whether the mortgage was mentioned was a pure question of fact, and must be taken to have been decided by the jury in favour of the appellant. There was evidence on which they might fairly have found ratification, but I do not think it is possible to say that they were bound in law to do so. The point now sought to be raised upon the Leiser mortgage is, in my opinion, not open to the respondents for the reasons I have given earlier in this judgment. I should, however, add that it appears to me inconceivable that, if the case stood as is now asserted, the respondents should have acquiesced on both trials in its being left to the jury upon this point. But in truth I think there was evidence that as between the bank and the appellant the bank should not have made this payment. It is a fallacy to say, as was said for the respondents, that this would be to vary the written contract contained in the mortgage of September 13, 1912, and the memorandum of September 11, 1912. These two instruments did not set out any contract as between the bank and the appellant. They were contracts between the appellant and the Westholme Lumber Company. At the interviews of the appellant with the bank the point was emphasized that the important matter was that the appellant's money should be available for providing the plant required for the further prosecution of the contract, and the appellant's mortgage should be a second mortgage, with only the mortgages of the bank and the Royal Trust Company, which were taken as one, in front of it. It was open to the jury to infer from this—and it seems to me not an unreasonable inference—that

when the bank took the appellant's advance they took it as between him and them to be applied in getting the necessary plant, and not in paying off the mortgage in priority to the appellant's, of which he had never been informed. Unless this was the case, the course taken at both trials is quite inexplicable. There seems to me to be a certain absence of reality about this part of the respondents' case.

Misdirection was also alleged by the respondents, and it was said that this would entitle them to a new trial. The alleged misdirection was upon five points. The first was that the judge should have told the jury that no action would lie for want of care in giving advice gratuitously. For the reasons I have already given there is, in my opinion, nothing in this point. The second point is that in the summing-up at p. 724, A, of the appendix the judge told the jury there was nothing either to confirm *or rebut* the appellant's evidence. This was described by the learned counsel for the respondents as a very small point. There is really nothing in it at all. As was pointed out when it was made, the learned judge distinctly put the respondents' version to the jury. The third point was that the learned judge did not explain to the jury what "advice" meant. I have already dealt with this point in the earlier part of this judgment. The fourth point was that the question as to the Leiser mortgage should not have been left to the jury. With this point also I have already dealt. The fifth point was that the learned judge mentioned the interest of the bank in the Westholme Lumber Company as a reason for supposing that authority was given to Galletly to advise. The learned judge refers to this as one point made by Mr. Gordon Hewart, counsel for the plaintiff. It was contended that the interest of the bank negatived the authority. I cannot agree. For the reasons I have already given, this circumstance only imposed the duty of making a full disclosure to the appellant of the bank's interest. It was the interest of the bank that led to Mr. Galletly's thorough familiarity with the affairs of the company, and this appears to me to be an element in the question whether Mr. Galletly might advise upon that particular matter as distinguished from advising generally as to investment. I cannot see any misdirection in point of law which would justify an order for a new trial, nor, in my opinion, could the verdict be set aside as against the

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Finlay L.C.

weight of evidence. Upon the question of liability the learned judge seems to me to have put the case to the jury fairly and adequately.

There remains, however, the question of damages, and on this point I think that the judgment for 25,000*l.* was not warranted by the finding of the jury. They found damages for "25,000*l.* and all securities to be returned to the defendant bank." The jury had no power to give a verdict of this kind. The appellant held the securities, and the jury ought to have estimated their value and allowed it, if any, in reduction of damages. Unfortunately the learned judge had been compelled to leave before the jury returned, and indeed there was no verdict given in Court, as for this the presence of the judge is essential. There was no opportunity for clearing up the meaning of this finding by further questions to be put to the jury or of affording assistance to them by further directions from the bench. It is now suggested by the appellant that all that the finding meant was that the securities were worthless and that the finding did not mean to award that the securities should be given up to the bank, the whole 25,000*l.* being given as damages. But as the finding stands I do not think it can be said that this is its meaning. I think, also, that there ought to have been a fuller summing-up as to the law on the question of damages, such as was given by the Lord Chief Justice on the first trial.

The result is that there must be a new trial on the question of damages in the absence of an agreement between the parties. I think that in this case the damages might be ascertained without retrying the case as a whole. The damages are in respect of the negligent advice to advance the $125,000, not in respect of a number of representations, in which case it would have been necessary that it should be ascertained in respect of which of the representations the damages were to be given. Assuming a verdict for the plaintiff, the damages would be the money advanced under the negligent advice, subject to a deduction of the value of the securities held by the plaintiff, and the only inquiry necessary would be as to the value of these securities as to deduction. In my opinion the appeal ought to succeed, subject to a new trial or inquiry as to the amount of the damages. It appears to me that the order of the Court of Appeal entering judgment for the defendants was erroneous on the law and the merits, and that it proceeded upon grounds not open upon the

appeal. If it stands it may have an unfortunate effect upon the conduct of jury trials.

LORD ATKINSON. My Lords, I regret that I am unable to concur in the judgment just delivered by my noble friend upon the woolsack.

The Court of Appeal, by the order appealed from, has directed that the judgment entered for the appellant, the plaintiff, in the action out of which this appeal has arisen, should be set aside and judgment be entered for the defendants in the action, the respondents in this appeal. The learned Lords Justices based their judgment on two grounds—(1.) that there was no evidence before the jury proper for their consideration upon which they, as reasonable men, could find that the respondents had authorized their local manager at Victoria, one Galletly, to advise the appellant on the subject of his investments in Canada, or that the respondents owed any duty to the appellant to advise him carefully or at all on that subject; and (2.) that Lord Tenterden's Act applied to an innocent representation, such as Galletly was alleged to have made, as to the nature of the investment upon which the plaintiff did, in fact, invest his money. I agree with the Court of Appeal as to the first ground on which they based their judgment. I cannot agree with them as to the second. On the contrary, I think, for reasons I shall give presently, that Lord Tenterden's Act only applies to fraudulent representations, not to an innocent representation such as Galletly is alleged to have made.

It is admitted that at the trial before Darling J., out of which the appeal arises, counsel on behalf of respondents did not ask the presiding judge to direct a verdict for the defendants, the bank, on any ground whatever. What occurred at a previous abortive trial, with which this appeal has nothing to do, is, in my opinion, absolutely and entirely irrelevant. A preliminary point has been raised on behalf of the appellant before your Lordships, and pressed most persistently, namely, that by reason of this omission the Court of Appeal, notwithstanding the provisions of Order LVIII., r. 4, of the Rules and Orders of the Supreme Court of 1883, had no jurisdiction to make the order which has been made by it. The contention amounted to this, that the making of this requisition to the judge presiding at the trial is a condition precedent which must be

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Atkinson.

performed before judgment can be given for a defendant by the Court of Appeal, however absolute and complete may be the absence of all evidence to sustain the verdict found by a jury in a plaintiff's favour. The Court of Appeal have not dealt with this preliminary point, apparently because, though mooted in argument, it was not really pressed before them. It is, however, a very important point, and should, I think, be ruled upon by this House. It is therefore necessary, in my view, to consider what is the duty of a judge presiding at a trial before a jury in cases in which no evidence has been given upon which, in his opinion, they could, as reasonable men, find a verdict in favour of the plaintiff in an action. Willes J. and Lord Cairns, Lord Penzance, Lord Coleridge, and Lord Blackburn amongst others have, I think, each stated, in no ambiguous language, what that duty is. In *Ryder* v. *Wombwell* (1), which was an action brought against a minor for the price of goods, alleged to be necessaries, supplied to him, Willes J., in delivering the judgment of the Court of Exchequer Chamber, composed of himself, Byles, Blackburn, Montague Smith, and Lush JJ., said: "Such a question" (i.e., whether the goods were necessaries or not) "is one of mixed law and fact; in so far as it is a question of fact it must be determined by the jury, subject no doubt to the control of the Court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff or direct a verdict for the plaintiff if the onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, as stated by Maule J. in *Jewell* v. *Parr* (2), not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." It is quite true that in that case the judge at the trial had, it is stated, refused to nonsuit, so that he apparently

(1) L. R. 4 Ex. 32, 38. (2) (1853) 13 C. B. 909, 916.

had been asked to do so, and had reserved to the defendant liberty to move to enter a nonsuit if the Court should be of opinion that there was no evidence to go before the jury that either of the articles supplied was a necessary. (1) I do not find, however, that this most learned, painstaking, and accurate judge, in laying down the general principle, suggests in any way that it should be qualified by a proviso to the effect that a verdict is not to be directed against the person on whom the burden of proof lies unless his opponent, by himself, or his appointed advocate, asks at the trial that it should be so directed.

In *Metropolitan Ry. Co.* v. *Jackson* (2), in which the action was brought against the defendant company for the injury caused to the plaintiff by the alleged negligent act of one of the company's servants in closing the door of the carriage in which the plaintiff was travelling at such a time and in such a manner as to injure the plaintiff's thumb, it is stated that the learned judge at the trial ruled that there was evidence of negligence to go to the jury. I do not know that it can be inferred from this statement that he was asked to rule the contrary. The jury found a verdict for the plaintiff. A rule was obtained to set aside this verdict and enter a nonsuit or a verdict for the defendants on the ground that there was no evidence of negligence proper to be submitted to the jury. There had been a great division of judicial opinion in the Courts below, and Lord Cairns said (3) : " The case as to negligence having been left to the jury, the jury found a verdict for the respondent with 50*l.* damages. There was not, at your Lordships' Bar, any serious controversy as to the principles applicable to a case of this description. The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred ; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which

(1) L. R. 3 Ex. 90, 91. (2) 3 App. Cas. 193.
(3) Ibid. 197.

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Atkinson.

negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred ; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever." But this is precisely what would happen, if the appellant's contention be sound, in every case in which the presiding judge ought to have nonsuited the plaintiff, or directed a verdict for the defendant if asked so to do, but abstained from doing it because he was not asked. Lord Blackburn quotes with approval the passage I have quoted from the judgment of Willes J. in *Ryder* v. *Wombwell* (1) and concurs with Lord Cairns. In *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (2) an action was brought by a widow whose husband had been killed by the alleged negligence and mismanagement by the appellants of their railway. At the close of the plaintiff's case the counsel for the railway company submitted to the presiding judge, Palles C.B., that there was no evidence of negligence on the part of the defendants, the company, to be left to the jury, that even on the plaintiff's evidence there was contributory negligence shown, and that the deceased was a trespasser, and asked the Chief Baron to nonsuit the plaintiff, which the learned judge refused to do. Lord Hatherley said (3) : " I will, in the first place, state my concurrence with Mr. Justice Barry's opinion in the Court below, viz., ' When once a plaintiff has adduced such evidence as, if uncontradicted, would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury.' But I concur, also, in the opinion expressed by Chief Baron Palles, that ' When there is proved, as part of the plaintiff's case, or proved in the defendant's case and admitted by the plaintiff, an act of the plaintiff which per se amounts to negligence, and when it appears that such act caused or directly contributed to the injury, the defendant is entitled to have the case withdrawn from the jury.' " It is to be observed that the proposition is not that the defendant is entitled to have the case withdrawn from the jury if he should ask that to be done. There is no such qualification. Lord

(1) L. R. 4 Ex. 32, 38. (2) 3 App. Cas. 1155.
(3) Ibid. 1168.

Penzance says (1): "There are, no doubt, cases in which there is either no reasonable evidence of the want of due and reasonable care in the defendant's conduct, or, if such want exists, of its connection with the accident in the relation of cause and effect. And in such cases it is the recognized and unquestioned duty of the judge to withdraw the case from the jury, upon the simple ground that there is no evidence in support of the issue fit for them to take into their consideration." Lord Coleridge says (2): "Now it is admitted that in order to justify a case being submitted to the jury, there must be evidence of negligence on the part of the defendants, and also that the negligence in fact caused the injury complained of. . . . . It is also clear that if the undisputed evidence, or the admissions in the case, negative the latter proposition, the judge must withdraw the case from the jury, because the plaintiff has not satisfied the onus which lies on him." Lord Blackburn, after pointing out that the jury are not bound to believe the whole or any part of a witness's evidence, says (3): "And (according to what the state of the evidence is) he" (i.e. the judge) "should either direct the jurors that if they believe the witnesses, there is reasonable evidence on which they may properly find facts, and draw inferences, such that they may find for the party against whom the onus lies; or that, even though they believe the whole of what is sworn to, there is no evidence on which they can properly find the question for that party on whom the onus of proof lies, and, therefore, to direct them to find the verdict against that party. . . . . To justify a direction to find a verdict the onus must be one way, and no reasonable evidence to rebut it." Though a requisition was apparently made in this case, as I have already pointed out, the rule laid down is stated in general terms in each of these judgments, and no reference is made to the necessity of a requisition to impose upon the presiding judge the duty referred to.

It is no doubt true that in practice a judge does not generally withdraw a question from the jury unless asked to do so. There is, I think, an obvious reason for that. It is this: If it should turn out that he was wrong in so withdrawing it he might inflict great cost upon the litigant in whose favour he withdraws it, though the latter

(1) 3 App. Cas. 1175. (2) Ibid. 1194.
(3) Ibid. 1201.

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Atkinson.

might possibly have got from the jury a finding in his favour. But the question whether he has jurisdiction to withdraw the issue from the jury, though not asked to do so, is quite another matter, and the above cited authorities are, I think, much more in favour of the existence of such a jurisdiction than of its non-existence. I confess I cannot bring myself to believe that a judge presiding at a trial before a jury is bound to leave to them an issue which, in his opinion, there is not, in point of law, any evidence to justify them, as reasonable men, in finding in favour of the party upon whom the burden of proof of that issue lies, simply because the opposing party, or his counsel, has not asked him to withdraw the issue from them. The omission to make such a requisition cannot, in my view, relieve the judge from ruling upon the question of law, which, by reason of the absence of such evidence, is by the conduct of the case raised for his decision. In the abstract, therefore, I incline to the opinion that a requisition to a judge to enter a nonsuit or direct a verdict for a defendant is not a condition precedent which must be fulfilled in order to entitle him to do either. But then comes in the question of the alleged binding effect of the course of the trial.

The well-known passage from Lord Halsbury's judgment in *Macdougall* v. *Knight* (1), to the effect that when parties take their chance of what a jury will do nothing can be more mischievous than to allow litigants to raise new questions when the jury have decided against them, was much relied upon for the appellant, but those observations, the wisdom and justice of which cannot be questioned, were made in reference to a contention urged on behalf of a litigant that questions other than those put to the jury by the judge at the trial should have been put, though those appearing for that litigant never asked to have them put. That is entirely different from the present case. There the judge could at once have remedied the defect, if it was a defect, if his attention had been called to it. Here the judge could not remedy the defect, namely, the absence of all evidence upon which the jury could properly find for the plaintiff. *Seaton* v. *Burnand* (2) is to the same effect. Cases such as these, or cases where what is complained of is misdirection or non-direction by the judge presiding at a trial, do not, in my view, touch cases such as the present, for the simple

(1) 14 App. Cas. 194, 199. (2) [1900] A. C. 135.

reason that in them the objection, if made, could at once be met and the alleged defect cured, while in the present case, all the evidence possibly procurable having been given, the defect could not be cured. It seems hardly just or right that a verdict which never should have been found should be allowed to stand simply because the judge was not asked to prevent its being found. I now turn to Order LVIII. and rr. 1 and 4. The first rule provides that an appeal shall be a rehearing; the fourth that the Court of Appeal shall, on the hearing of appeals, have power to receive further evidence upon questions of fact, but that, upon appeals from a judgment after the trial or hearing of any cause upon the merits, such evidence is to be admitted by leave on special grounds. The rule further provides that the Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made. But the rule does not stop there. It goes on to provide that that Court shall, in addition, have power to make "such further or other order as the case may require." These later words must have some meaning assigned to them. They evidently extend to the making of an order which the Court appealed from could not have made. In the case of trials by juries that Court was, at the time these rules and orders were made, the Divisional Court. It is now, under Finlay's Act, the Court of Nisi Prius in which the trial takes place. The powers conferred upon a Divisional Court are by these Orders much more restricted than those conferred upon the Court of Appeal. By Order XL., r. 10, it is provided that upon a motion for judgment, or upon an application for a new trial, the Divisional Court can draw inferences of fact, but only such inferences of fact as are not inconsistent with the findings of the jury. In addition it is provided by Order XXXIX., r. 6, as amended in 1913, that a new trial may be granted by the Court of Appeal on the ground of misdirection or the improper admission or rejection of evidence, or because the verdict of a jury was not taken upon a question which the judge at the trial was not asked to leave to them, if that Court should be of opinion that some substantial wrong or miscarriage has been thereby occasioned. The question as to what amounts to "substantial wrong or miscarriage" within this rule has been considered in *Bray* v. *Ford* (1) and several other cases, but at all

(1) [1896] A. C. 44.

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Atkinson.

events the rule comes in conflict to some extent with the doctrine that parties are absolutely bound by the course of the trial, since it provides that in the cases mentioned a new trial may be granted because the verdict of the jury was not taken upon a question which the judge was not asked to leave to them.

The construction and reach of Order LVIII., r. 4, has been considered in several cases. It is necessary to examine a few of them in some detail. In *Quilter* v. *Mapleson* (1), which was an action brought by virtue of a condition of re-entry on breach of a covenant to insure contained in a lease, the defendant claimed relief under the statute 22 & 23 Vict. c. 35, s. 4. The plaintiff recovered judgment on July 14, 1881. On August 4, 1881, the defendant appealed. A stay of execution was granted and renewed, so that the plaintiff never recovered possession. On January 1, 1882, the Conveyancing and Law of Property Act, 1881, came into operation, after which the appeal was heard. The Court of Appeal held, first, that this last-named statute was retrospective in its operations, and, second, that, even if the order of the Court below was right, as the law stood at the time it was made, the Court of Appeal was, by the words "to make such further or other order as the case may require," empowered to grant to the tenant the relief to which he was entitled according to the law as it stood on the hearing of the appeal. Jessel M.R. and Lindley and Bowen L.JJ. delivered judgments, which appear to me to be absolutely convincing, to the effect that Order LVIII., r. 4, was designed to enable the Court of Appeal to do complete justice between the parties litigant, even though it should involve the making of an order which neither the judge at the trial nor the Divisional Court had jurisdiction or power to make. In *Millar* v. *Toulmin* (2) the jury found a verdict for the defendant. The Divisional Court made an order for a new trial on the ground of misdirection, and of the verdict being against the weight of evidence. The Court of Appeal, composed of Lord Esher M.R., Bowen L.J., and Fry L.J., held that, as in their opinion they had all the facts before them, they had power, instead of merely making an order for a new trial, to order that judgment should be entered for the plaintiff, though no requisition had been made by the plaintiff's counsel to the judge at the trial at the end of the defendant's case to direct a verdict for the

(1) 9 Q. B. D. 672. (2) 17 Q. B. D. 603, 605.

plaintiff. Lord Esher, in giving judgment, said: "In the present case I am of opinion that we have all the facts before us, and that no further evidence could be given which could alter the result, and therefore instead of directing a new trial we ought to enter judgment for the plaintiff. If there is any question as to amount, it can be settled by the Master." Bowen L.J. said: "I am of the same opinion. I think that the verdict was against the weight of evidence, and must be set aside, and I think we have all the facts before us. I agree with the Master of the Rolls that under Order LVIII., r. 4, the Court of Appeal has power to relieve against all miscarriages of justice, and can direct judgment to be entered, if satisfied that no jury could properly come to a different conclusion." And Fry L.J. said: "I also think the verdict was against the weight of evidence. The question then arises, what is our duty? Have we power, not only to set aside the verdict, but to enter judgment the other way? The difference between Order XL., r. 10, and Order LVIII., r. 4, is very great, and the latter rule, which applies to the Court of Appeal, gives larger powers than the former. The reason appears to be that the Court of Appeal has power to hear fresh evidence, and therefore they ought not to be bound by the finding of the jury in drawing inferences of fact." Now, as all these learned judges thought the verdict was against the weight of evidence and should be set aside, what conclusion must they have come to with reference to that evidence? They must, according to the decision in *Metropolitan Ry. Co.* v. *Wright* (1), have come to the conclusion that "the verdict was one which a jury, viewing the whole of the evidence reasonably, could not properly find." And what conclusion should a judge come to before he can direct a verdict to be entered for a defendant? Why, that there is no evidence to go before the jury upon which they could, as reasonable men, find a verdict for the plaintiff. No doubt in cases where the verdict is set aside as against the weight of evidence there will be evidence on both sides, but now that the scintilla doctrine has been abandoned, the tasks of the Court in the two classes of cases closely approach each other. It is, no doubt, true that when this case of *Millar* v. *Toulmin* (2) came on appeal to this House (3) it was held that there

(1) (1886) 11 App. Cas. 152. (2) 17 Q. B. D. 603.
(3) 12 App. Cas. 746.

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Atkinson.

was no misdirection by the learned judge at the trial, and that the verdict of the jury was not against the weight of evidence; and the judgment of the Court of Appeal was reversed. Lord Halsbury alone of the noble Lords who heard the appeal expressed doubt as to whether Order LVIII., r. 4, conferred upon the Court of Appeal jurisdiction to make the order they had made, finding, as he says in effect, a verdict for themselves and actually assessing damages. The other noble Lords abstained from expressing any opinion upon this point. It is obvious that Lord Halsbury's criticisms are inapplicable to a case where a verdict might properly have been directed for the defendant had such a direction been asked for, and the only defect was that it was not asked for.

In *Allcock* v. *Hall* (1) the jurisdiction of the Court of Appeal under Order LVIII., r. 4, again came up for consideration. The action was tried before Hawkins J. and a special jury. The evidence was conflicting. The jury found a special verdict in favour of the plaintiff on the main issue between the parties. The learned judge reserved judgment. On an application for a new trial on the ground that the verdict was against the weight of evidence the Court of Appeal, applying the principle laid down in *Metropolitan Ry. Co.* v. *Wright* (2), set aside the verdict, holding that it was utterly irreconcilable with the evidence in the case when reasonably considered. They also decided that when applications under Finlay's Act (53 & 54 Vict. c. 44), though not technically appeals, came before the Court of Appeal, that Court could exercise all the powers possessed by it under Order LVIII., r. 4, and following *Millar* v. *Toulmin* (3), and being satisfied that nothing would be gained by ordering a new trial, they entered judgment for the defendant. Lindley L.J. delivered the leading judgment, and, after the other judgments had been delivered, made this important statement: "I wish to add that we have consulted our colleagues in the other branch of the Court, who have carefully considered the point and agree in our decision." This case must therefore be regarded as one of very high authority indeed. My Lords, in the face of this decision it is, in my view, now impossible to deny that if the Court of Appeal should in any given case be of opinion, first, that they have all the

(1) [1891] 1 Q. B. 444, 449. (2) 11 App. Cas. 152.
(3) 17 Q. B. D. 603.

facts before them, and that there is no reason to think that further evidence of importance could be produced at another trial, and, secondly, should be also of opinion that the evidence given at the trial was such that the presiding judge should, if asked by the defendant's counsel, have either nonsuited the plaintiff or directed a verdict for the defendant, that Court has now power under Order LVIII., r. 4, not only to set aside a verdict found for the plaintiff, but in addition to enter judgment for the defendant. If the Court can do this, as these cases decide it can, where there is conflicting evidence in a case, but an overwhelming balance of it on one side, it would be strange indeed if the same Court should not have power to do it where there is no evidence proper and sufficient to sustain a verdict found for a plaintiff, simply because the counsel for the defendant has at the trial omitted to ask that this should be done. To hold so would appear to me to make this doctrine that parties are to be bound by the course of the trial an instrument of great injustice.

In the case of *The Tasmania* (1) the Court below held that the ship the *City of Corinth*, with which the *Tasmania* collided, was alone to blame. The Court of Appeal took the same view. In the latter Court the point was for the first time raised that the evidence showed that the *Tasmania* was also to blame. Lord Herschell deals with the point thus: "My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. . . . . It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness-box."

The rules here laid down, admirable and just in a case to which

(1) (1890) 15 App. Cas. 223, 225.

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Atkinson.

they apply, have no application whatever to a case like the present, where all the defendants ask for is to get the opportunity to show that the verdict found against them has no proper evidence to support it, and object to be shut out from doing this by the omission of a technical formality. In my opinion, therefore, the omission of the defendants' counsel at the trial to address to the judge the requisition I have mentioned did not, having regard to the provisions of Order LVIII., r. 4, deprive the Court of Appeal of jurisdiction to make the order they have made based upon the first ground. The privilege of raising in your Lordships' House points not raised in the Court below is a matter of grace, not of right.

The cases of *Misa* v. *Currie* (1), *Connecticut Fire Insurance Co.* v. *Kavanagh* (2), and *Sutherland* v. *Thomson* (3) lay down the principles which should guide the House in the exercise of its discretion in this matter. In the present case I think the appellant was properly allowed to raise the point, even on the assumption that it was not raised in the Court of Appeal.

Having dealt with the preliminary objections, I now turn to the consideration of the substantive case. I think in the first place that the statement of claim is extremely ambiguous in its language and most embarrassing. Its 2nd paragraph contains five distinct averments: (1.) That the respondents, the bank, acting by and through their agent Galletly, advised the appellant to invest a sum of $125,000 in a loan on mortgage to the Westholme Lumber Company, Limited, representing the mortgage as a perfectly safe investment. (2.) That the bank by the same agent represented that the mortgage would be a second mortgage ranking only behind a first mortgage held by the bank itself. This representation deals with a future event, and amounts either to an undertaking or a prophecy, but, whether the one or the other, the appellant has in fact got what it was represented to him he would get. He has got a second mortgage on the lands of the company ranking only behind the bank's own mortgage. (3.) That the bank by the same agent represented that the money to be advanced by the appellant was required and would be used solely for the purpose of completing a contract then in progress in the city of Victoria. This representation is treated in

(1) (1876) 1 App. Cas. 554, 559. (2) [1892] A. C. 473.
(3) [1906] A. C. 51.

paragraph 4 of the statement of claim as amounting to an undertaking, or contract, that the appellant's money would be so applied, which undertaking imposed upon the bank a duty towards the appellant to see that it was so applied, and that the bank, in breach of that duty, allowed a portion of the money to be used to pay off a mortgage given by the company to Simon Leiser & Co. In addition a question was at the trial framed upon this alleged breach of duty and left to the jury, who answered it in the affirmative. It is quite impossible to say how far their award of 25,000*l.* damages was influenced by this fact. In my view there was no evidence whatever before the jury upon which they could, as reasonable men, find that the bank ever promised, undertook, or contracted to see to the application of the appellant's money in the way described, or that the bank ever owed any duty to the appellant to see that it was so applied, or that they ever received any money from the appellant for the purpose of so applying it or of having it so applied. The terms of the two most important documents in the case, namely, the appellant's memorandum of September 11, 1912, and the mortgage deed of September 13, 1912, especially the latter, are irreconcilable with such an arrangement. The former merely provides that the loan is to be used for the Sooke Lake water proposition, that is, the contract mentioned in the 1st paragraph of the statement of claim, and the latter expressly provides that the mortgagors, the Westholme Lumber Company, shall use the sum of $125,000 for no other purpose than for expenses incurred, or to be incurred, in the construction of the water supply. This latter provision was observed in fact, and the only past debts of the company paid out of it were debts incurred in the construction of the waterworks. (4.) That the bank through this same agent represented that with this loan the company would be able to carry out the contract without having to borrow any more money. That is merely an anticipation. It is not a contract. (5.) In paragraph 3 of the statement of claim it is averred that the appellant instructed the bank to carry out the investment. Whatever may be the true meaning of the word "advise" as used in the 1st paragraph of the statement of claim, it cannot, I think, cover and include an engagement or promise to see to the application of this loan for the purposes mentioned. Still less, I think, can it cover an undertaking to carry out an

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Atkinson.

investment. There is no evidence that the bank ever undertook such a work as this latter.

During the progress of the lengthy argument which was addressed to your Lordships many efforts were made, but without success, to obtain from the appellant's counsel some definition of this word "advise." It was insisted that it included something more than the expression by the adviser of an opinion bona fide believed by him to be true. But what that something else was could not, apparently, be described in precise language. Giving advice, it was admitted, did not require that the adviser should disclose to the advised the ground upon which the opinion he expressed was based. Neither did it require that the adviser should disclose to the advised all the information he possessed which might be calculated to enable the advised to form his own independent opinion. All that Mr. Talbot could be induced to attempt in the way of a definition was that the advice must not be "misleading." I confess I have some difficulty in appreciating what is here meant by the word "misleading." It does not mean, I presume, merely that the advice must not be given in ambiguous language. The language used in the present case was plain and simple. Nor does it mean, I presume, even where the advice is given gratuitously, as in this case, that it must be sagacious, prudent, wise, sound, or cautious. Fraud has not been charged against Galletly, either in the shape of deliberate deceit, or in the shape of that recklessness which has been held to amount to wilful misstatement. The man is dead, as is also Sir E. Clouston. Neither of them has ever had the opportunity of giving his account of the respective conversations with the appellant, and fraud, not being charged explicitly, cannot be insinuated, so that it must be taken that, whatever advice Galletly gave, he gave it honestly, expressing an opinion he bona fide believed to be true. I confess I entertain the greatest doubt that anything beyond that was required of him. It was suggested that he should have informed the appellant of the fact, of which he no doubt was aware, that others held an opinion different from his own. Well, it was urged that Canadian banks and their officers in this matter of advising their customers as to investments are in the position of skilled persons, such as doctors and lawyers, who, if they undertake, even gratuitously, to treat or advise a person, are bound to use the skill and

knowledge they have, or profess to have, and that if they omit to do so they are guilty of gross negligence: *Shiells* v. *Blackburne* (1); *Coggs* v. *Bernard*. (2) Even if that were the true position of these officials, it would not by any means follow that Galletly was, as agent of the bank, bound to give to the appellant the information suggested. It could not, I think, be contended that if a doctor, when advising a patient gratuitously, told the latter that in his, the doctor's, opinion the patient's symptoms were those of indigestion, not heart disease, he was bound in addition to inform the patient, if the fact were so, that many other doctors thought that symptoms such as the patient's were indicative of disease of the heart, or that a lawyer who was advising a client gratuitously on a point of law was not only bound to tell him truly what his opinion on the point was, but in addition, if the facts were so, to add that several lawyers held a contrary opinion. No authority was cited in support of such a strange proposition. Moreover, so far from there being anything to show that the bank and its officers are in fact, or hold themselves out as being, persons skilled in advising upon investment, though they are by the Revised Statutes of Canada, 1906, c. 27, by s. 76 authorized to engage in and carry on such business as generally appertains to the business of banking, yet they are, except so far as authorized by that Act, prohibited from lending money or making advances on the security of or by the hypothecation of land. Sect. 80 no doubt empowers them to hold mortgages of real or personal property as security for debts due to the bank by their customers. These provisions would tend to show that these officers have not the opportunity or training to become skilled persons in such matters, but rather the contrary. It was not, however, contended in this case, as I understand the evidence, that it was within the scope of the employment of every local manager, or even of the general manager of the bank, to advise all their customers gratuitously, or at all, upon the subject of investment; but that, owing to certain special facts and circumstances proved in evidence in this particular case, it might be inferred that Galletly, as manager of the Victoria branch of the defendant bank, was acting within the scope of his authority and in the course of his employment, in recommending

(1) 1 H. Bl. 158.
(2) 2 Ld. Raym. 909; 1 Sm. L. C., 12th ed., 191.

H. L. (E.)
1918
BANBURY
v.
BANK OF MONTREAL.
Lord Atkinson.

the appellant to make a loan to this company on the security of a second mortgage of the portions of their property mentioned in the schedules annexed to the deed of mortgage. The facts and circumstances so relied upon appear from the passages printed at pp. 670 and 679 of the appendix to be the following: (1.) That the bank had at this particular time, to the knowledge of Galletly, a considerable interest in this Westholme Company, i.e. a pecuniary interest, the company being in fact indebted to the bank to a considerable amount, and the bank holding a first mortgage over their land and a floating charge over all their assets. (2.) That Galletly was at the time taking various steps, in the interest of the bank, in relation to the company and taking part in certain negotiations. (3.) That in these negotiations he recommended the appellant to put his money in, i.e. lend his money to the bank's debtors. (4.) The letter dated July 6, 1911, written by Sir Edward Clouston, he then being the general manager of the bank. It is clear from several passages in the summing-up of Darling J. that he understood the appellant's case was to this effect. At p. 718 of the appendix he pointed out to the jury that it was not alleged that it was the general duty of a bank manager to advise everybody, and at p. 726 occurs the following passage, which, in justice to the learned judge, I cite at length. It runs thus: "Now I must ask you these questions; I have read you the first one. 'Had Mr. Galletly authority as manager of a branch of the defendant bank to advise plaintiff to invest $125,000 on mortgage to the Westholme Lumber Company?' You notice that there is nothing said there about the general authority to advise any customer who might come in about investing money. Mr. Hewart does not contend that a branch manager had any such general authority. He says, 'I admit he had not,' but he says in those particular circumstances, seeing what were the transactions between the defendant bank and the Westholme Lumber Company, seeing what was the correspondence between the manager at Vancouver, Mr. Sweeny, and Mr. Galletly, seeing what was the interest of the bank in getting financial assistance for the Lumber Company, there was authority given to Mr. Galletly to advise Captain Banbury. It is true he says he found it first of all upon the letter of Sir Edward Clouston written upon that. He says 'There it is'; it says 'advice,' it does not say advice must be limited to shooting or fishing or beauty

spots on the coast, or anything of that sort; it says 'advising,' and then, Mr. Galletly being engaged in keeping on foot this Westholme Lumber Company so that they could carry out their contract for the benefit of the bank, he says upon all the letters that have been read to you, and all the evidence that has been given, you may come to the conclusion that although there was no general authority in every branch manager to give such advice as Mr. Galletly is said to have given to Captain Banbury, yet in this particular case there was authority to give the advice which Mr. Galletly did give to Captain Banbury. Now, gentlemen, that is for you to decide; it is not for me to decide. All I can tell you is that there is evidence that I feel justified in leaving a question about. If the learned counsel thought there was no evidence he would have submitted to me that I ought not to leave the question to you. That has not been submitted, and I therefore leave that question to you." I think that the learned judge did not receive from the counsel engaged in the case the assistance he was entitled to expect.

My Lords, if this letter of Sir Edward Clouston formed, as is alleged, some presumptive evidence of the intention of the writer to create the legal confidential relation between Galletly and the appellant of adviser on behalf of the bank and advised, the matters mentioned under the foregoing heads Nos. 1, 2, and 3 would have effectually rebutted that presumption; inasmuch as in that relation the interest and the duty of both Galletly and the bank would have been in direct conflict. The interest of Galletly as local manager of the bank, who allowed the company to become so heavily indebted to the bank, as well as the interest of his principal, the bank, would have been to procure a loan to be made to the bank's debtors on any security they could offer, whether good or not, in order to put the company in funds to help them to carry out their contract, lessen their debt, and enhance the value of the bank's securities; while the duty of Galletly as plaintiff's adviser would have been to put out of view the bank's interest, and to think only of the appellant's interests in advising him to make this loan. It would be as legitimate to contend that from the mere fact that a man was employed by an owner of property to sell it one may presume that he had implied authority to buy it himself, or that from the fact that a man was appointed trustee of certain property he had implied authority to buy the trust

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Atkinson.

funds from the cestui que trust. You cannot infer from the fact that a man is put in a certain position, that he has power and authority to do that which by reason of that very position the law forbids him to do. Sir William Taylor, the general manager of the respondents' bank, when examined as a witness on the bank's behalf, proved that the branch managers of the bank have no general authority whatever to advise any one as to investments (p. 644), and at p. 671 he further proved that if Mr. Galletly during the negotiation about the aforesaid company brought to somebody's notice a scheme for financing the company, he would, in that matter, be acting in the course of his employment as manager of his branch, but that if he proceeded to recommend that scheme to this person as a thing to invest in, he would be exceeding his authority. That evidence was not contradicted in any way. The burden of proving that Galletly, in giving advice, acted within the scope of his authority and in the course of his employment rested, of course, upon the appellant. And yet one would almost suppose from some of the questions put that the burden was reversed. For instance, a point was made and pressed that amongst the written rules of the bank for the guidance of managers there was no rule forbidding them to advise as to investments.

Again, much of the argument addressed to your Lordships might have more force if Galletly was himself the banker. He by advising the appellant, though gratuitously as he did, might have taken upon himself a duty which he was bound to discharge at least without gross negligence, but that is not the position at all. The point is, even if he did so advise, are the respondents bound by his acts, and responsible for his alleged breach of the duty he had become bound to discharge? A wholly different matter. If the four matters relied upon to establish that Galletly was, in giving advice to the appellant, acting within the scope of his authority and in the course of his employment the letter of Sir E. Clouston alone remains. I proceed to consider it. It would, under any circumstances, be much to be regretted that Sir E. Clouston was not alive to give his account of the circumstances surrounding the writing of this letter, the conversation with the appellant leading up to the giving of it, the purpose for which it was asked and given, and the matters to which it related. I think it is in the present circumstances

doubly regrettable because the appellant's evidence upon this point is neither precise nor detailed. He says that in July, 1911, he visited Sir Edward Clouston in Canada and had with him on that occasion a discussion with regard to investments in Canada. No particulars whatever are given as to the nature of this conversation, whether it was merely a general conversation about Canadian investments, or whether or not the appellant informed Sir Edward that he was anxious to invest money in Canada and was looking out for "a suitable investment" there. Nothing of the kind. On the contrary, on cross-examination he admitted that Sir E. Clouston was a personal friend of his; that he, the appellant, visited the country in 1911 for pleasure; that the Canadians are a very hospitable people; that they would pass a visitor on from one part of the country to another in order that he might have a good time; that he knew perfectly well a letter of the sort that Sir Edward Clouston wrote was constantly given by kindly, hospitable people in order that a person going from one place to another might know what hotel to go to and secure that he should be well received; that he went to the island of Vancouver in 1911 on a fishing visit and did not use the letter; that he did not do any business in 1911 and was only looking round, and only presented the letter for the first time when he went to Victoria in September, 1912, fourteen months after it had been written. The letter runs as follows:—"Head Office, Bank of Montreal, July 6, 1911. The Managers, Bank of Montreal. Dear Sirs,—I take pleasure in introducing to you Captain Banbury, of London, who is visiting this country on pleasure. Should he apply to you for assistance or advice you will be good enough to place yourselves at his disposal. Yours faithfully, (Sgd.) E. S. Clouston, General Manager." If this be read as it should be, in the light of the respective positions of the writer and of the receiver, the object of the latter's visit and the social habits of the Canadian people, as described by the appellant himself, I think it is clear that originally, at all events, it was nothing more than a friendly letter, the writing of it merely an act of kindly courtesy designed to secure for the bearer of it as he went from place to place a good reception, and the performance of the friendly services he mentioned. The letter is addressed to all the local bank managers without distinction. It is a kind of circular letter. There is nothing ambiguous about it.

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Atkinson.

Its language is clear enough. It contains no reference to investments or explicitly to any business matters. And it is, in my mind, perfectly impossible to believe that a man of sagacity and of experience in business, such as Sir Edward Clouston must have been, could ever have intended to create between the appellant and his bank, through the agency of any branch manager to whom the letter might be presented, the legal confidential relation of adviser and advised on the subject of investment of money, entailing on the bank all the responsibilities such a relation would impose. But it was, as I understood, contended that, even if this letter was originally given merely as an act of courtesy and friendship to secure for the appellant the kindly services I have mentioned, it was, on the appellant's interview with Sir Edward when he visited him in July, 1912, applied to an altogether different subject-matter—converted into a business document, its whole nature, character, and purpose changed. The appellant's account of what took place at that interview is this. He says he again discussed with Sir Edward the subject of investment of money in Canada, that the latter asked him if he wanted a letter, that the appellant replied that he had the letter Sir Edward had given him the previous year, and that Sir Edward then said that would do as well. And no doubt it would do as well if Sir Edward's object was merely to secure for the appellant the friendly services and attention I have mentioned ; but it was wholly inadequate as a business document, if it was meant to have the effect now contended for. If Sir Edward meant to give to all his local managers to whom this letter might be presented by the appellant, the vast authority it is urged he has given, no reason can be suggested why he should not have done that in clear and specific language. There is the same vagueness, too, in the appellant's account of this interview as there was in that of his first interview. He does not say explicitly that he asked Sir Edward to give him any advice on the subject of Canadian securities, or to procure for him advice of that kind from his branch managers, nor to authorize those branch managers to carry through for him any investment he might decide upon. Nor does he say that Sir Edward Clouston ever promised to do any one of these things. Everything is left vague. In my opinion this letter does not derive from the occurrences alleged to have taken place at the second interview any significance or meaning

beyond what it had from the first. I am therefore of opinion that there was not before the jury any evidence proper for their consideration upon which they could, as reasonable men, find, as they have found, (1.) that Galletly was clothed with authority to give, on behalf of the respondents, advice to the appellant as to his investments; or (2.) that the respondents owed any duty to the appellant to advise him upon the matter of his investment carefully, or at all. Having come to that conclusion, it is not necessary for me to decide whether, if such a duty as is last mentioned had existed, there was any evidence before the jury to sustain a finding that the bank were, through their agent, guilty of a breach of it amounting to gross negligence, but the inclination of my opinion is that there was no such evidence before them. I have already expressed my view as to the other issues raised in the pleadings, and I am of opinion, on the whole case, that if the learned judge had at the trial been asked, on the grounds I have mentioned, to direct a verdict for the defendants, the bank, he should have done so. Mr. Ogden Lawrence contended on behalf of the respondents that the principle of *Coggs* v. *Bernard* (1) never could apply to the mere giving gratuitously of advice. No doubt in most, if not all, of the authorities mentioned in the notes to that case in 1 Smith's Leading Cases, 172, 188 et seq., something amounting to agency existed between the person for whom the gratuitous service was performed and the person who rendered it; but in the case of persons who possess or purport to possess skill and knowledge in some art or profession, such for instance as doctors or lawyers, I do not think it can be said that the giving of advice is not an act done for the patient or client advised, as the case may be. It is well established that if a doctor proceeded to treat a patient gratuitously, even in a case where the patient was insensible at the time and incapable of employing him, the doctor would be bound to exercise all the professional skill and knowledge he possessed, or professed to possess, and would be guilty of gross negligence if he omitted to do so. I think prescribing medicines or a course of dietary for a patient would come within the same rule, and I do not well see any difference between a doctor telling a patient he has heart disease, for instance, and prescribing a remedy, and merely telling him he has heart disease without prescribing a remedy,

(1) 2 Ld. Raym. 909.

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Atkinson.

In both cases he must do something on the body of the patient. Neither do I think it can be said that a solicitor who merely advises a client as to his legal rights, but does not undertake to conduct his cause, can well be said not to do something for the client. In other words, I do not, as at present advised, think that the acts done, or to be done, can be confined, at all events in the case of skilled persons, to physical as distinguished from mental acts. Owing to the view I take on the other issues in the case it is not necessary for me to express a definite opinion on this point, and I abstain from doing so.

Lord Tenterden's Act (9 Geo. 4, c. 14) is entitled "an Act for rendering a written memorandum necessary to the validity of certain promises and engagements." Sect. 1 deals with actions of debt or upon the case grounded on any simple contract, and enacts that no acknowledgment or promise shall be sufficient unless made in writing signed by the party chargeable, but leaves untouched the effect of the payment of any principal or interest. Sect. 3 deals with the indorsement of memoranda of payments on promissory notes, bills of exchange, &c., and s. 6, which is evidently modelled on s. 4 of the Statute of Frauds, enacts that "no action shall be brought whereby to charge any person upon, or by reason of, any representation made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon [*sic*] (1), unless such representation or assurance be made in writing signed by the party to be charged therewith." I assume for the purpose of the construction of this section that the findings of the jury as to Galletly's authority and as to the advice given by him to the appellant are correct; that the representation made by Galletly amounted to a representation or assurance concerning or relating to the credit, ability, and trade of the Lumber Company, and was given for the intent and purpose that that company might obtain money from the appellant. It is admitted that any representations made by Galletly were made innocently.

(1) [The word omitted or transposed by a clerical error is generally believed to have been "credit": *Lyde* v. *Barnard*, 1 M. & W. 115; it has also been suggested that "upon" represents an insufficient cancellation of "thereupon": *ibid.* 123, 124.—F. P.]

The question then is, does this section of Lord Tenterden's Act apply to innocent representation? No doubt the words of the section are general. On its face it applies to every representation, innocent or fraudulent; but one cannot construe these words, general in character though they be, without having regard to the circumstances in reference to which they were used, and to the object appearing from the statute which the Legislature had in view in using them. Lord Coke in the well-known passage in *Heydon's Case* (1) lays it down that to get at the scope and object of an Act one should consider (1.) what the law was before it was passed; (2.) what was the mischief or defect for which the law had not provided; (3.) what remedy Parliament has appointed; (4.) the reason for the remedy. In *Hawkins* v. *Gathercole* (2) Turner L.J. said that, "in construing Acts of Parliament, the words which are used are not alone to be regarded." He then quotes with approval and adopts a passage from the judgment in *Stradling* v. *Morgan*. (3) This statement of the law was by Turner L.J. stated to be the best he knew of. It has been approved of by Lord Hatherley in *Garnett* v. *Bradley* (4), by Lord Selborne in *Bradlaugh* v. *Clarke* (5), and by Lord Halsbury in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks*. (6) The passage from Plowden is so applicable to the present case and, approved of as it has been, is so authoritative that one may be excused for quoting it at length. It runs thus: "The judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular where the interest was particular"; and after referring to several instances proceeds: "from which cases it appears, that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions

(1) (1584) 3 Rep. 7b.
(2) (1855) 6 D. M. & G. 1, 20–1.
(3) (1560) Plowd. 199, 204, 205.
(4) (1878) 3 App. Cas. 944, 950.
(5) (1883) 8 App. Cas. 354, 362.
(6) [1898] A. C. 571, 575.

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Atkinson.

have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign " (i.e. extraneous) " circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." Well, there cannot be any possible doubt as to what was the cause and necessity of the passing of Lord Tenterden's Act. It was the evasion of the 4th section of the Statute of Frauds by the decisions in those actions for deceit, of which *Pasley* v. *Freeman* (1) was the first. In these actions the parties were made liable, not for innocent representations and assurances, but for false and fraudulent representations and assurances of a third party's solvency, made by parol with intent to deceive, and acted upon by those to whom they were made. In *Lyde* v. *Barnard* (2) Alderson B. is reported to have said " that the decisions in that class of cases, commencing with *Pasley* v. *Freeman* (1), had raised a well-founded complaint in the profession, as having in fact virtually repealed the Statute of Frauds, by which a guarantee was required to be in writing, and that the object Lord Tenterden had in view was to place both on the same footing, and to provide that a written document should be equally required in both. The two cases are, I think, identical in principle ; for, a guarantee increases the ability of the third person who is about to be trusted, by adding to the value of his personal responsibility that of the person making the guarantee. And, in like manner, as the false and fraudulent representation as to the third person's ability equally adds, in the opinion of the person trusting to it, to the value of the third person's responsibility ; it ought justly to have, and it has in law, the effect of pledging also the personal responsibility of the fraudulent representer of the facts. The fraud in substance amounts to an implied guarantee of the third person's solvency. I think, therefore, that we should take this as the key to the true construction of Lord Tenterden's Act." Parke B. is reported as expressing himself to practically the same effect (3) ; and Lord Abinger C.B. says (4) :

(1) 3 T. R. 51.
(2) 1 M. & W. 101, 107.
(3) 1 M. & W. 114.
(4) Ibid. 117.

"The obvious policy of this statute" (i.e. the Statute of Frauds) "was to prevent that fraud and perjury which had been found by experience, or was thought probable, to arise from trusting to evidence of less authority than that of a written document for fixing upon a defendant the responsibility for the debt, default, or miscarriage for which another person was primarily liable. . . . . This statute seems to have successfully accomplished its object, till a mode was discovered of evading it, by shaping the demand, not upon a special promise, which the statute supposes, but upon a tort or wrong done to the plaintiff, by some false or fraudulent representation of the defendant, to induce him to contract with another person. The first case of this kind was that of *Pasley* v. *Freeman*. (1) . . . . It was to remedy the inconvenience resulting from the frequency of those actions that Lord Tenterden introduced the statute 9 Geo. 4, c. 14, s. 6." The learned judges who heard this case were equally divided upon the question whether or not the representation relied upon referred to Lord Edward Thynne's personal responsibility and credit or merely to the condition and extent of his property, but they were all agreed as to the proper construction of Lord Tenterden's Act. That statute was in truth an Evidence Act in the same sense that the 4th section and possibly the 17th section of the Statute of Frauds are Evidence enactments. Lord Blackburn in *Maddison* v. *Alderson* (2) is reported to have said: "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." In my opinion the object of Lord Tenterden's Act was somewhat similar, namely, to secure that in all actions for deceit, such as *Pasley* v. *Freeman* (1), the false and fraudulent representation relied upon should be proved by a written document signed by the party to be charged, and in no other way. No new statute was required at the time the Act was passed to deal with innocent representations. This statute was, I think, designed to deal with false and fraudulent representations and those alone, and, being of that opinion, I think that, despite the generality of the words "Any representation or assurance," I am, acting on the principle of interpretation of

(1) 3 T. R. 51. (2) (1883) 8 App. Cas. 467, 488.

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Atkinson.

statutes laid down in *Stradling* v. *Morgan* (1), bound to construe the Act so as to carry out the intention of the Legislature which passed it, and to hold that it applies to representations and assurances of this latter character and to those alone. In *Lyde* v. *Barnard* (2) Lord Abinger gives his reasons for coming to the conclusion that the word "upon" in the phrase "upon or by reason of" occurring in Lord Tenterden's Act was introduced by mistake. On the whole, therefore, I am of opinion that this appeal fails and should be dismissed with costs here and below, but if this conclusion be not arrived at by your Lordships' House, I think this verdict cannot be allowed to stand. Issues were left to the jury upon which there was no evidence, the case of the defendant was never properly put before them, the damages were assessed upon an entirely erroneous basis, and were possibly awarded in respect of causes of action not proved to exist.

LORD SHAW OF DUNFERMLINE. (3) My Lords, I have had the great privilege and advantage of perusing and reperusing the judgment by the noble and learned Lord Chancellor which he has just delivered. In the light of it and of the other judgments in the case I have anxiously considered the serious step which this House is asked to take in affirming the judgment of the Court of Appeal and in making a pronouncement on the merits of this case in contradiction to the verdict of the jury upon it. My Lords, I am humbly of opinion that the judgment of my noble and learned friend on the woolsack is correct. I agree with it and with every part of it. I may be allowed, however, to add a statement of the position of the case from my own point of view; but after the fulness and care with which the narrative of facts, the statements of procedure, and the propositions of law have been set out by the Lord Chancellor my exposition will naturally be brief. I am, indeed, induced to do this as unfortunately I cannot but fear that, if the judgment of the Court of Appeal stands, the place and value of jury trial as a recognized part of the judicial machinery in civil causes in England may have been seriously impaired, and that not by parliamentary action, but by the interposition by the judiciary into our legal proceedings of doctrines which appear to me to be novel, and which I cannot,

(1) Plowd. 199, 204. (2) 1 M. & W. 101.
(3) Read by the Lord Chancellor.

for the reasons also set forth by the Lord Chancellor, reckon to be sound. It is true that the impanelling of the jury would remain, but, standing the judgment of the Court of Appeal, the finality which in general attaches to a jury's verdict would be rendered unsure, and it would become, instead of practically conclusive in the general sense, merely an incident in a more or less protracted litigation, both before and after the jury has sat. I think that such results have been pointed to and condemned by judges of the highest eminence and notably in this House by Lord Halsbury.

Whether to my advantage or disadvantage, I am able to look at the situation with regard to legal procedure from a point of view probably more detached than the English practitioner. In Scotland jury trial as a means of obtaining a verdict upon fact is also an established institution, but the procedure prior to the remit of a case to a jury is materially different from that in England. The statements of parties are articulately set forth on record, and the pleas in law proponed by each party are also articulately set forth. Before the determination is come to as to whether a jury shall try the case issues are adjusted for the trial. And it is at that stage that the exact legal bearing of the case is determined. The relevancy of the statements of either party to go to probation is adjudicated upon, and the adjustment of the issues for the trial is the latest appropriate stage when the issues of law come to be determined. If I were to illustrate the procedure from the present case, the entirety of the discussion with which your Lordships were favoured by the Bar on the subjects of what was the business of the bank under its charter, and what was the duty of the bank in regard to the matter of advising about investments, and lastly, what was the possible authority that can be delegated in view of such duty and business to one of the agents of the bank, all that would have been threshed out at the preliminary stage to which I have referred. If the action was legally excluded, as in substance it would appear to be by the judgment of some of your Lordships, by reason of the business, the duty, and the delegated authority of the bank not covering a transaction of the kind alleged, that would have been affirmed and the action would have been dismissed. But if not affirmed, the non-affirmation would depend upon this—that each of these questions was a question depending upon facts to be

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Shaw of Dunfermline.

elicited on the line of the averments, and issues would have been adjusted for the trial of the case. Before the jury the parties would have been confined to the scope of their own averments, and the issue thus obtained on specific and definite lines would have been final in fact, unless it was unsupported by any reasonable evidence, in which case a new trial would have been granted. As to law, it would also have been final except in two cases, first, the improper admission of evidence by the judge, and, secondly, a misdirection of the jury by the judge. But in both of these cases, my Lords, *exception must be taken at the time, and in the presence of the jury, and noted.* If that be not done—and it is one of the most anxious duties that counsel have to discharge—the verdict is a final verdict, and no Court of law will entertain such exceptions afterwards. While the system in England, my Lords, is different, in my humble opinion its essentials are the same, and at the heart of these essentials, so far as points of law are concerned, lies this proposition, that it is neither competent nor proper for Courts of law, after the trial and entering up of the verdict, to entertain them. The duty of counsel, in my opinion, includes in England at one stage, namely, the trial stage, the duty which in Scotland, for obvious and satisfactory reasons, occurs at two stages, namely, both those of the relevancy and of the trial. That duty is to make clear before the judge charges the jury what are the propositions in law which are desired from the former, and what are the propositions in fact which are desired from the latter. As I read the procedure in England—and in this I am greatly fortified by the opinion of the Lord Chancellor—this has been in substance the universal practice of English law Courts, and in my opinion there is every ground in reason and principle for compelling adhesion to it.

So clear, to my mind, are these things, that I am somewhat surprised that there is any authority upon them, as authority is generally confined to seriously disputed propositions. Such authorities as there are, however, confirm in the highest quarters the view just expressed. I refer to the judgment of Williams J. in *Jones* v. *Provincial Insurance Co.* (1) That learned judge, delivering the judgment of the Court, referred to the course taken at the trial rendering it unnecessary to pronounce an opinion upon certain points

(1) 26 L. J. (C.P.) 272, 274.

argued, and stated broadly: "The defendants, therefore, cannot now be heard to argue any such points not raised at the trial." The Lord Chancellor has referred at some length to *Graham* v. *Huddersfield Corporation* (1) and the judgment of Lord Esher, who said "that the objection that the defendants had taken their point too late must prevail . . . .; they had waived the point in Court during the trial by allowing the case to proceed till verdict on the basis that the only issue was whether there had been a promise in fact to pay for this work. In his opinion it was not open to them to take the point now." And in this the other Lords Justices concurred. The points not taken were important, namely, first, that the contract relied on was not under seal and not binding, and, secondly, that by a certain section of the Public Health Act no committee could enter into such a contract and bind a corporation. These things were legally vital. There is some analogy, my Lords, to that in the present case, in which, after the verdict of the jury delivered and entered up, points are raised which are also mentioned to be legally vital—as to the scope of the bank's business, duty and the like, and the competency of any bank agent to bind his employers. Yet these things were not permitted to be introduced as the subject of decision for the purpose of upsetting the verdict, prior to which they were not taken.

In *Macdougall* v. *Knight* (2) Lord Halsbury made these observations, which I think are appropriate to the present case: "I think it was the duty of those who are suggesting that other questions ought to have been asked and other issues raised to have intervened at this point" (that is, in the course of the trial) "and to have requested Baron Huddleston definitely and distinctly to put the questions that they now insist ought to have been submitted to the jury. But nothing of the sort was done. The parties took their chance of what the jury would do, and I think nothing could be more mischievous than to allow litigants to raise new questions when, under such circumstances, the jury have decided against them. If such a course were permitted no end could possibly be found for litigation."

In *Nevill* v. *Fine Art and General Insurance Co.* (3) the same great judge said: "Where you are complaining of non-direction of the

(1) 12 Times L. R. 36, 37. (2) 14 App. Cas. 194, 199.
(3) [1897] A. C. 68, 76.

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Shaw of Dunfermline.

judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect." And in *Seaton* v. *Burnand* (1) Lord Halsbury said: "The learned judge with great care and deliberation formulated questions and submitted them to counsel, and gave counsel time and opportunity of considering whether any other questions ought to be asked; and, after taking time for consideration, the learned counsel for the defendant stated that there was no other question which they wished the jury to be asked, nor did they wish to vary the form of the questions that were proposed to be asked. Under such circumstances, it would really be putting a premium upon the loosest possible mode of conducting business to suggest that questions could be again formulated by counsel and then submitted to another jury."

I do not further attempt to enunciate the principle thus amply fortified by authority; but I now proceed to call attention to the fact that the learned judge at the trial, Darling J., seems, in my judgment, to have most properly relied upon this being the state of the law. It would further appear to me that the counsel representing the bank also accepted that situation. To permit the bank now to go back upon that humbly appears to me to upset correct legal procedure, to be unsound in law, and to be fraught with dangerous consequences. While most unwilling to add to the survey of the facts made by the noble and learned Lord Chancellor, I may be permitted to refer to the leading particular of this case illustrative of the general principle to which I have referred. It is also fair to Darling J. that I should do so. I allude to the manner in which the question of Mr. Galletly's authority on behalf of the bank to advise the appellant as to investments was treated. That gathers within itself or has a most important bearing upon many of the questions mooted, and some of them unfolded, in the debate in this House. Could the letter from the general manager to the local manager bear the construction put upon it? Had the general manager himself any such authority? Could the bank, in view of

(1) [1900] A. C. 135, 143.

its charter and the scope of its business, give, or be assumed to give, any such authority ? My Lords, how was this question dealt with at the trial ? It was treated as an issue dependent on the particular circumstances, and was put to the jury as a question of fact. This was so done in the presence, to the knowledge, and, in my opinion, with the entire assent of counsel for the bank itself. The question put was : " Had Mr. Galletly authority, as manager of a branch of defendants' bank, to advise the plaintiff to invest $125,000 on mortgage to the Westholme Lumber Company ? "

In putting this to the jury the learned judge described the contentions of parties upon it. And I should say pointedly that the evidence upon the issue was all admitted without objection or exception or reservation in law. Having stated the rival views on the point, Darling J. said, and in my opinion, looking to the conduct of the case before him, most reasonably and properly said : " Now, gentlemen, that is for you to decide ; it is not for me to decide. All I can tell you is that there is evidence that I feel justified in leaving a question about. If the learned counsel thought there was no evidence, he would have submitted to me that I ought not to leave the question to you. That has not been submitted, and therefore I leave that question to you." What more could be demanded of a judge in such circumstances I am quite at a loss to see. The course in this particular was, in my opinion, in accordance with practice, precedent, and good sense.

But, my Lords, one further occasion arose, before the trial judge parted with the case, upon which any legal issues then competent to the bank could have been, according to English practice, submitted, namely, on the motion to enter up the verdict. The course taken on that occasion was equally significant of the bank's legal attitude. Two submissions, and two alone, were put forward by Sir John Simon. These were—(1.) that (upon a matter to which I shall presently allude) the verdict for 25,000*l.* was incompetent as having attached to it a condition as to handing over certain securities to the bank, and that such a conditional verdict could not be a ground of judgment against the respondents. The second point taken was that under Lord Tenterden's Act. I do not dwell upon the latter, concurring as I do with all your Lordships that the judgment of the Court of Appeal on that topic is erroneous in law and that the point is bad. No other points were taken.

H. L. (E.)
1918
BANBURY
v.
BANK OF MONTREAL.
Lord Shaw of Dunfermline.

It therefore appears to me, my Lords, demonstrated that this case, upon its facts, falls within the principles to which I have already referred, and that to allow other points to be taken, either in the Court of Appeal or in this House, would be violation of those principles. In these circumstances the verdict would stand in its entirety but for the point as to the conditional form of the verdict of damages.

One can see how it arose. Counsel for the appellant treated the securities in the hands of his client as substantially worthless and offered to hand them back. The judge did not explain the impossibility of a conditional instead of an appropriate and final verdict to the jury, and unfortunately when the jury returned to Court he was unable to be in his place to do what possibly might have saved much anxiety to all concerned, namely, to ask the jury to retire and to put their verdict in an unobjectionable form. I agree, accordingly, that the case, failing arrangement of parties, must be retried on the question of the proper assessment of damages.

Further, my Lords, in no view could I have agreed with the course taken by the Court of Appeal that this was a case to which Order LVIII., r. 4, truly applies. The case, in my opinion, in any event, would have had to be retried upon such issues as the Court could have indicated to be proper. But I cannot view this case as one in which either the Court of Appeal or this House is able to affirm that it has before it all the material necessary and possibly available in order to enable it to determine the cause. Unless that be so, I am of opinion that the rule referred to should not be put into operation.

My Lords, I desire to add two observations. The existence of the rule and the very fact that a Court can, in certain circumstances, exercise such a power and supersede a new trial by its own judgment give force to the submission that in all respects, whether as regards admission of evidence or the tabling of any submissions upon points of law at the trial, that trial shall be conducted in the strictest compliance with those canons of propriety and practice to which I have alluded. To allow these to be neglected at the trial and to allow new points afterwards to be brought forward, and thereupon, upon that new matter, either in whole or in part, to give a judgment in a sense entirely contrary to the jury's verdict, this appears to me to be in a special sense contrary to those principles and accompanied

by those dangers to which I have alluded. For it appears to me to be manifest that this is, in a cause appropriate for trial by judge and jury, to make a decision on the one hand upon issues of fact never laid before the jury, and on the other hand upon issues of law never laid before the judge. I cannot see my way to assent to an argument, rather hinted at than actually submitted, that if appellate Courts differ from the results properly arrived at by the appropriate tribunal upon the law and facts before it it would be wrong to give effect to those results. On the contrary, in my view it would be wrong to substitute one's own opinion and to proceed to exercise a function and a duty cast in other quarters. That would be a usurpation.

Before I close I desire to say that I think too little, very much too little, account was taken in the Court below of the evidence of the appellant. He was carefully and searchingly examined and cross-examined, and he was believed. I also think that too little account was taken of the actual position of the bank at the time when these representations were made by its local agent. They were large creditors of a customer, their indebtedness and insecurity had reached such a point that they instructed their sanguine representative to stop every penny of further advance, and their desire for cover was the subject of anxious communication between the head and the local office. In these circumstances I lay no blame upon their learned counsel for not taking the point at the trial that the bank's authority did not extend to what was done. It appears to me that the bank adopted the creditable as well as the judicious course in facing the issue of fact whether careless representations were made. In these circumstances I can hardly agree that it lies with Courts of law to reach a result by means which the bank itself did not seek. This also, my Lords, confirms the general conclusion upon procedure with which I have ventured to trouble the House.

LORD PARKER OF WADDINGTON. (1) My Lords, in the action in which this appeal arises the appellant sought to make the respondent bank liable in damages for the negligence of Mr. Galletly, one of their local managers, in advising the appellant to invest 25,000*l.* on a mortgage of land in Canada. It is, I think, obvious that if it be

(1) Read by Lord Wrenbury.

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Parker of Waddington.

part of the bank's business to advise their customers with regard to Canadian investments the bank would be liable for any negligence of their branch manager in transacting this class of business on the bank's behalf. Prima facie the person held out by the bank as the manager of one of their branches would have authority to transact all the bank's business in connection with that branch, and no limitation of such authority as between him and the bank would affect a person dealing with the bank without notice of the limitation. The statement of claim shows a correct appreciation of this position. It, in effect, alleges (paragraph 1) that it is part of the bank's business to advise their customers as to Canadian investments; (paragraph 2) that the appellant was a customer of the bank, and that the bank, through their manager, advised him to make the investment in question; (paragraph 3) that he made the investment relying on such advice; (paragraph 4) that the advice was negligently given; and (paragraph 6) that by reason of such negligence the appellant lost his money. On this statement of claim the appellant had to prove in limine that it was part of the business of the bank to advise their customers with regard to Canadian investments. If he established this, he need not trouble further as to the authority of the manager. The scope of such authority would be coincident with the scope of the bank's business. If such business included advice as to investments, the manager would have a general authority to advise on investments on the bank's behalf.

My Lords, in the course of the trial counsel for the appellant admitted that the manager had no general authority to advise—in other words, that it was not within the scope of the bank's business to advise on investments at large. I take this to include Canadian investments; otherwise there would be no point in the admission. It does not appear why the admission was made. It may have been because the powers of the bank were by statute confined to carrying on a banking business; and it would be difficult to establish that advising on investments was part of the business of banking. However this may be, the contention ultimately put forward on the appellant's behalf was that under the special circumstances of this particular case the manager had authority to advise the particular investment which he did in fact advise. In my opinion, as soon as counsel had made the admission and formulated

the contention above referred to he ought not to have been allowed to proceed further without amending the statement of claim. I doubt whether he could have amended it without making it demurrable, for he would have had to state the special circumstances on which he relied, and, as will appear presently, these circumstances all point to the impossibility of the manager having had the authority suggested. Moreover, the contention ultimately put forward on the appellant's behalf is not free from ambiguity. I think it must be taken to mean that the special circumstances referred to made it part of the bank's business to advise with regard to the particular investment in question, and, therefore, that the general authority of the manager as such extended to giving this advice. But it may have been intended to suggest that the special circumstances referred to invested the manager with a special authority beyond the general authority incident to his position as manager. At any rate, it is only on this latter footing that so much importance can have been attached to the letter of Sir Edward Clouston, the general manager of the bank, dated July 6, 1911. This letter has little or no bearing upon the question whether the special circumstances of the case made it part of the bank's business to advise the investment in question, but, construed as the appellant's counsel desired, it might be evidence of a special authority conferred by the bank through their general manager upon their branch managers. Unfortunately the bank, being a corporate body governed by statute and not a natural person, were incapable of conferring, through their general manager or otherwise, authority to do anything outside the scope of their authorized business, and, inasmuch as the branch manager had already a general authority to transact on behalf of the bank all the bank's business in connection with his branch, no further authority was necessary. The real question must, therefore, be whether the special circumstances of the case made it part of the bank's business to advise on this particular investment. If they did, the manager's general authority was amply sufficient to bind the bank. If they did not, no special authority could, even if proved, be of any avail.

My Lords, the judge at the trial, without objection by the respondent bank, left it to the jury to say whether Mr. Galletly, as manager of a branch of the defendant bank, had authority to advise the

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Parker of Waddington.

plaintiff to lend his money on the mortgage in question. I take this question to mean that the jury were to say, not whether Mr. Galletly had any special authority beyond his authority as branch manager, but whether his general authority as branch manager extended to advising the appellant to make this particular investment. In other words, it asks whether the special circumstances of the case made it part of the bank's business to give the advice which Mr. Galletly gave on their behalf. The jury answered the question in the affirmative. On appeal, by way of motion for a new trial or other relief, the Court held that there was no evidence upon which the jury, acting as reasonable men, could come to the conclusion that Mr. Galletly had the authority referred to in the question put to them, and, acting upon the powers conferred on them by the Rules of the Supreme Court, Order LVIII., directed judgment to be entered for the respondent bank.

My Lords, I am clearly of opinion that the Court of Appeal were right in holding as they did. The special circumstances relied on in favour of Mr. Galletly's having had authority to advise the appellant are really only two. First, there is the letter to which I have already referred. Even if construed as the appellant desires, I cannot see that it has any bearing on the real issue. But such a construction is to my mind impossible. The letter, in effect, asks Mr. Galletly (among others) to befriend a person who is travelling on pleasure by giving him assistance and advice. It does not contemplate Mr. Galletly contracting with the traveller any such relationship as would give rise to legal liabilities on the part either of the writer or the bank. Secondly, there is the circumstance, amply proved both by the documents and oral evidence, that the bank were deeply interested in obtaining, and had, through Mr. Galletly, already endeavoured to obtain, financial assistance for the company to whom the appellant advanced his money. This circumstance is no doubt of the utmost importance, but it seems to me to prove almost conclusively that the question left to the jury ought to have been answered in the negative. No one is in a position to give advice where his interest conflicts with his duty, and facts which prove that the bank were not in a position to advise at all are certainly not evidence that it was part of the bank's business to give advice. If the question of authority was to be left to the jury, the

jury should have been warned that these facts were evidence against, and not in favour of, the appellant's contention. It may well be that the interest which the bank had in the company's financial stability made it part of the bank's business to assist the company in obtaining a loan, but this same interest made it improper for the bank to advise any proposed lender.

My Lords, the above considerations would be sufficient to dispose of the main question which arises on this appeal but for a preliminary point taken and pressed by counsel for the appellant. It was contended that, inasmuch as the matter was left to the jury without objection on behalf of the respondent bank, it was not open to the Court of Appeal to inquire whether there was evidence which could justify the jury, as reasonable men, in finding as they did. This contention does not appear to have been raised in the Court of Appeal. The fact that the respondent bank had not objected to the matter being left to the jury was no doubt mentioned, but rather as showing that there must have been evidence for the jury to consider than as excluding the jurisdiction of the Court. It would perhaps be enough to say that the point, not having been taken in the Court of Appeal, must be treated as waived and is not open before your Lordships' House. But in my opinion the point, if taken in the Court of Appeal, must have been overruled. There are no doubt cases in which the Court of Appeal have refused to allow points of law not taken in the Court of first instance to be raised on appeal. But these cases do not go to jurisdiction, but to discretion. It may be that if a point of law had been taken below further evidence would have been adduced, or a further or different question left to the jury. In such cases it would be manifestly unfair and unjust to allow the point to be raised for the first time in the Court of Appeal. In the present case there is no such element of unfairness or injustice. It is not suggested that had the point been taken below any further evidence could have been adduced, or any further or different question left to the jury. Why, then, should not the Court of Appeal have felt itself at liberty to do complete justice between the parties on the evidence before them? I can see no reason at all. It was suggested that, having regard to the nature of the point of law in this particular case, the old nisi prius procedure was of some materiality, and showed that the point, if taken at all, must be

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Parker of Waddington.

taken at the trial. I cannot agree. The difference between there being no evidence to go to the jury and the jury's verdict being against the weight of evidence was no doubt of more importance then than it is now. It may be that the former point had to be taken by asking a direction from the trial judge, but clearly the latter point could not be taken at the trial. It could only be raised on motion for a new trial. It must, therefore, have always been open in the Court which had jurisdiction to grant a new trial. That Court is now the Court of Appeal. But the Court of Appeal have certain further powers under the Rules of the Supreme Court, Order LVIII. Instead of granting a new trial, they can, in a proper case, direct judgment to be entered for the defendant. They ought, in my opinion, to exercise this power whenever such a course will, in their opinion, do complete justice between the parties—for example, when they have all the available evidence before them, and there is no chance of a new trial bringing to light other material facts. It appears to me that this is precisely that case. See *Millar* v. *Toulmin*. (1)

My Lords, though, strictly speaking, it is unnecessary, I agree that it is desirable to express an opinion on the proper construction of s. 6 of Lord Tenterden's Act (9 Geo. 4, c. 14). The cases which have been cited on this point are numerous, and I shall not deal with them in detail. We know Lord Tenterden's object in asking the Legislature to pass the Act which bears his name. The advantages intended to be secured by s. 4 of the Statute of Frauds had, in his opinion, to some extent been destroyed by the readiness of juries not only to find that alleged oral representations as to the credit of another had in fact been made, but that such representations had been made fraudulently so as to give rise to an action of deceit. Now I agree that Lord Tenterden's object would be irrelevant if the words of the 6th section of the Act were clear and unambiguous, but this is far from being the case. The section provides that "no action shall be brought whereby to charge any person upon or by reason of any representation," as to the credit, &c., of any other person, unless such representation be in writing signed by the person to be charged therewith. In one sense, no doubt, it may be said that an action is brought to charge a person upon or by reason of a

(1) 17 Q. B. D. 603.

representation whenever the representation is a necessary link in the chain of evidence which establishes the cause of action. Thus an action for breach of warranty of the soundness of a horse may be said to be brought upon or by reason of a representation that the horse was sound, though it would be more natural to say that the action was brought on the warranty. On the other hand, it must be remembered that the only representation which itself gives rise to a cause of action on the part of a person injured thereby is a fraudulent representation. An innocent representation, except possibly as raising an estoppel or implication of contract, has in itself no legal effect at all. It being possible, therefore, to give the words of the section a wider or a narrower meaning, it is quite in accordance with sound principles of construction to examine into the abuses which the Act was intended to remedy, and such examination is all in favour of the narrower meaning. Moreover, s. 6 of the Act, if construed as the appellant contends it ought to be construed, might involve very serious consequences. It is in the ordinary course of business constantly part of the duty of a solicitor to examine into and advise upon the pecuniary position of a person with whom his client is about to deal. It would be a serious matter if the solicitor could escape liability for negligence in the performance of this duty by giving his advice orally or under the signature of his managing clerk rather than under his own signature. Indeed, the fact that the writing required by Lord Tenterden's Act cannot be signed by an agent is an additional argument in favour of the narrower interpretation of the words of the section. Lastly, until the present case no attempt appears to have been made to construe the section to include actions for negligence. It is true that in *Haslock* v. *Fergusson* (1) and in *Swann* v. *Phillips* (2) the section was held applicable to actions of assumpsit; but if these cases be examined it will be found (1.) that the representation sought to be proved was fraudulent, and (2.) that the plaintiff might have brought an action for fraud though he elected to proceed in assumpsit.

(1) 7 Ad. & E. 86.

(2) 8 Ad. & E. 457. [The only authority for regarding the cause of action as assumpsit appears to be the use of that word in Adolphus & Ellis's head-note. Pleadings, argument, and judgments all treat the action as being on the case for deceit.—F. P.]

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Parker of Waddington.

Whether rightly or wrongly decided, these cases have no bearing on the present question, for it is common ground that Mr. Galletly acted honestly throughout. In my opinion, Lord Tenterden's Act does not apply to an action for breach of a duty to take care. I may add that the word " person " as used in the 6th section in my opinion includes a corporation.

My Lords, there is one further matter which requires consideration. It appears that the plaintiff having made up his mind to advance 25,000*l.* on the security of the second mortgage in question transmitted the money to the bank with instructions to complete the transaction on his behalf. He seeks in the alternative to recover this 25,000*l.* from the bank as money received to his use on the ground that the bank did not carry out his instructions, but (1.) applied part of the money in paying off a mortgage on the property given by the company to Simon Leiser & Co., and (2.) advanced the remainder of the money to the company on the security not of a second mortgage but of a fourth or fifth mortgage. With regard to (2.) I need say nothing, for it is quite clear that the security which the plaintiff obtained was a second mortgage and not a fourth or fifth mortgage. With regard to (1.), part of the plaintiff's money no doubt went in paying off the Simon Leiser mortgage. This mortgage had to be discharged in order that the plaintiff might get a second mortgage. It would be the bank's duty to see that it was discharged, and prima facie there was no reason why it should not in ordinary course be discharged, out of the moneys to be advanced by the plaintiff. The plaintiff, however, contends that this was contrary to his intention, as the bank well knew. His advance was to enable the company to complete their water supply contract, and in so far as his money was applied in any other way his intention was defeated. I think there are two answers to this contention. First, according to the memorandum made by the plaintiff himself on September 11, 1912, and left with the bank as their instructions, the company is to use the loan solely for the purposes of the contract ; but I do not read this as precluding the use of the money in paying expenses already incurred in carrying out the contract. In order to carry out a contract it may be as imperative to provide for past expenses as it is for future outlay. This was the view taken by the solicitor employed on the plaintiff's

behalf in British Columbia and embodied in the mortgage of September 13, 1912. It is quite certain that the amount due on the Simon Leiser mortgage represented moneys expended in the performance of the contract. Secondly, even if this be not the true view, the plaintiff, with full knowledge that part of his advance had been applied by the bank in paying off the Simon Leiser mortgage and that the value of his own security had been increased by the amount of such payment, accepted such security and thereby ratified the payment made on his behalf, even if such payment had been originally unauthorized. The jury have found that the bank acted negligently and in breach of duty in allowing part of the plaintiff's money to be used in paying off the Simon Leiser mortgage. They were not asked, and did not find, anything as to ratification. The facts were, however, beyond dispute, and the finding could not, under the circumstances, justify any relief under this head.

My Lords, a number of other points were raised and argued during the many days which this appeal occupied before your Lordships' House. It is, in my opinion, unnecessary to deal with them. I should like, however, to say this. The trial judge is said to have misdirected—I think in several respects he did misdirect—the jury. But I cannot think he received the assistance which might have been expected in so complicated a case. For example, the conflict of interest and duty involved in the bank advising the plaintiff in this particular matter appears to have been overlooked; and, again, with regard to the value of the plaintiff's security, the effect of the doctrine of marshalling was never even suggested. If the judge's attention had been called, however shortly, to the various points of law and fact discussed at such length before your Lordships' House, I cannot help thinking that the jury would have been more fully directed and that the parties would have been spared a prolonged litigation. Nor do I blame counsel. The fault lies in the system which permits a plaintiff to set up at the trial, without amending his pleadings, a case other than that put forward in the statement of claim. When this is done the new case cannot possibly be formulated with the precision necessary to elucidate either the principles of law which may be applicable or the issues of fact which may be involved. Both the counsel and the judge labour under great disadvantages, and a miscarriage of justice is all too likely to occur.

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Parker of Waddington

The system of pleading introduced by the Judicature Acts was, no doubt, intended as a compromise between the rigid system which prevailed in the common law Courts and the loose prolixity of the bill in Chancery. The bill stated all the facts at great length, and prayed such relief as the petitioner might be entitled to in the premises. The chancellor or vice-chancellor had to find out for himself what might be the equities between the parties. For this he could take what time he liked, and often took a very long time. The present practice appears to me to have most of the vices of the old procedure in Chancery. There are pleadings, it is true, but the pleadings are, for all practical purposes, disregarded. The plaintiff is allowed to prove what he likes and set up any case he can. The judge has no longer to deal with a case formulated on the pleadings, but to make up his mind whether on the facts proved there is any and what case at all. This disadvantage is accentuated when there is a jury, for the judge cannot take time to consider the matter, and counsel have not considered it as they would have done had they been compelled to embody their case in a statement of claim. Under these circumstances there is little wonder that a judge should misdirect a jury, and that the real questions of law or fact should, as in this case, emerge only after prolonged discussion on appeal. Had the plaintiff, after admitting that it was not within the scope of the bank's business to advise on Canadian investments at large, been compelled to amend his statement of claim by stating the special circumstances which, as he alleged, brought it within the scope of the bank's business to advise the plaintiff on this particular investment, I doubt whether the action would have proceeded further, and I am clearly of opinion that the question of authority would not have been left to the jury. The impossibility of the plaintiff's case would have been manifest on the record.

I agree that the appeal must be dismissed with costs.

LORD WRENBURY. My Lords, this is not an action for fraud. It is an action for negligence and breach of duty. The defendants are a corporation. The alleged negligence and breach of duty are those of an agent. These considerations limit to a large extent the field which must be covered to arrive at a decision of the case. The following points arise in the following logical sequence :—(1.) Lord

Tenterden's Act; (2.) authority; (3.) duty; (4.) negligence; (5.) measure of damages. If No. 1 be decided in favour of the respondents, the bank—if, that is to say, it is held that, the representation or advice not being in writing signed, the action is not maintainable—it is unnecessary to go further. If, however, No. 1 be decided in favour of the appellant, then No. 2 arises for decision. If upon No. 2 it is held that Galletly had no authority, again it is unnecessary to go further, and so on throughout the list. Alternatively No. 2 might be taken first, and if upon that point it were held that Galletly had no authority, it would be unnecessary to determine No. 1. But as the point upon Lord Tenterden's Act has been elaborately argued, I shall express my opinion upon it, although, having regard to my opinion upon No. 2, it is not really necessary to do so.

I take, then, first the question of Lord Tenterden's Act, and proceed to inquire whether s. 6 of that Act applies in an action brought, not for fraud, but for negligence and breach of duty in a matter in which, for the purpose of the inquiry, I assume that a representation was made or given concerning the character, conduct, credit, ability, trade, or dealings of another person, to the intent, &c., in the words of the section. The Statute of Frauds (29 Car. 2, c. 3) having required that in any case covered by s. 4 of that Act an action should not be brought unless the agreement upon which it was brought, or some memorandum thereof, should be in writing signed by the party to be charged or some person by him lawfully authorized, *Pasley* v. *Freeman* (1) upheld the device which had been discovered for evading that Act by founding the action, not upon a special promise which the statute supposes, but upon tort or wrong done to the plaintiff by a fraudulent representation of the defendant. *Pasley* v. *Freeman* (1) is the authority upon the common law action of deceit. In this state of things the statute of 9 Geo. 4, c. 14 (commonly called Lord Tenterden's Act), was passed. In *Tatton* v. *Wade* (2) Pollock C.B. said that Lord Tenterden had told him that his motive in procuring the passing of the Act was that he was struck with the fact that, numerous as were actions for false representation as to character and credit of third persons, the plaintiff almost invariably succeeded, which induced him to think that there

(1) 3 T. R. 51. (2) 18 C. B. 371, 381.

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Wrenbury.

was some latent injustice which required a remedy. In *Lyde* v. *Barnard* (1) Alderson B. and Lord Abinger C.B. stated in somewhat similar terms what in their view was the object of the statute.

Mr. Douglas Hogg has most conveniently brought to the attention of the House, in order of date, the decisions, so far as he can trace them, upon Lord Tenterden's Act. For convenience of reference hereafter, and for the purpose of my observations upon them, I state them here in order of date. They are as follows :—(1.) *Lyde* v. *Barnard* (1836) (2); (2.) *Haslock* v. *Fergusson* (1837) (3); (3.) *Swann* v. *Phillips* (1838) (4); (4.) *Devaux* v. *Steinkeller* (1839) (5); (5.) *Craig* v. *Watson* (1845) (6); (6.) *Tatton* v. *Wade* (1856) (7); (7.) *Williams* v. *Mason* (1873) (8); (8.) *Swift* v. *Jewsbury* (1874) (9); (9.) *Hosegood* v. *Bull* (1877) (10); (10.) *Pearson* v. *Seligman* (1883) (11); (11.) *Bishop* v. *Balkis Consolidated Co.* (1890) (12); (12.) *Hirst* v. *West Riding Union Banking Co.* (1901). (13) All of them were cases of fraud. Not all were actions of deceit upon the case. No. 2, *Haslock* v. *Fergusson* (3), was assumpsit for money had and received. *Clydesdale Bank* v. *Paton* (1896) (14) was upon the Mercantile Law Amendment Act, Scotland, 1856, s. 6, which was in terms similar to those of Lord Tenterden's Act, but with the modification that the writing may be signed "by some person duly authorized by him," words which are not found in Lord Tenterden's Act. In No. 8, *Swift* v. *Jewsbury* (15), Coleridge C.J. states that the subject of s. 6 of Lord Tenterden's Act is the charging of a person for an act of fraud, and Bramwell B. that "the effect of the statute is this, that a man should not be liable for a fraudulent representation as to another person's means unless he puts it down in writing, and acknowledges his responsibility for it by his own signature."

My Lords, these being the authorities, the question to be answered is, Does s. 6 of Lord Tenterden's Act apply to an innocent misrepre-

(1) 1 M. & W. 101, 107, 117.
(2) 1 M. & W. 101.
(3) 7 Ad. & E. 86.
(4) 8 Ad. & E. 457.
(5) 6 Bing. N. C. 84.
(6) 8 Beav. 427.
(7) 18 C. B. 371.
(8) 28 L. T. 232.
(9) L. R. 9 Q. B. 301.
(10) 36 L. T. 617.
(11) 48 L. T. 842.
(12) 25 Q. B. D. 512.
(13) [1901] 2 K. B. 560.
(14) [1896] A. C. 381.
(15) L. R. 9 Q. B. 301, 311, 316.

sentation ? In my opinion it does not. The words of the section are " to charge any person upon or by reason of any representation," &c. The words " charge any person upon any representation " point, I think, plainly to an action for deceit. To maintain such an action there must be fraud, and there must be damage. If these two are satisfied, nothing more is required. Fraud is the cause of action. The charge is made upon the tort committed by the fraudulent misrepresentation. The same is not true of an innocent representation. An innocent representation per se constitutes no cause of action. If there existed a duty, an action lies for negligence and breach of duty, and in that action the fact that there was misrepresentation, although innocent, is material. But an action cannot be maintained upon an innocent representation simpliciter. It is maintained upon the breach of duty. The innocent misrepresentation is not the cause of action, but evidence of the negligence which is the cause of action. The words " charge upon any representation " refer, I think, only to a case in which fraud is alleged. There are, however, the words " by reason of." These words do not, I think, bring within the provisions of the section a class of case not covered by the word " upon." They cover only, I think, similar cases, e.g., a case in which the defendant did not make the representation, but it was so made as that he was liable in respect of it, e.g., that it was made by a third party who may have been his agent. Another reason which leads me to the same conclusion is that Lord Tenterden's Act, which certainly was made in view of the Statute of Frauds, omits the words " or some other person thereunto by him lawfully authorized." Under Lord Tenterden's Act the writing must be signed " by the party to be charged therewith." The signature of an agent will not suffice. The reason, I take it, is that a man shall not be charged with fraud unless his own signature is attached to the document which evidences the fraud. My Lords, for these reasons I hold that in this action, which is not an action for fraud, but an action for negligence and breach of duty, the appellant is right in his contention that Lord Tenterden's Act does not apply. I am unable to agree upon this point with the judgments in the Court of Appeal. I may add that if I had been of opinion that in other respects the Act did apply, I should further have been of opinion that the defendants, who are a

H. L. (E.) 1918 BANBURY v. BANK OF MONTREAL. Lord Wrenbury.

corporation, are a "person" within that word in the section. The word "person" is three times used. If it does not include a corporation in the one place of user, it will not include it in another. If "person" does not include a corporation, the result would be that a representation as to the credit of a corporation would not be within the section. This cannot be the meaning. The decision in *Hirst* v. *West Riding Union Banking Co.* (1) upon this point was, I think, right.

Being of this opinion as to Lord Tenterden's Act, it becomes necessary to go on to consider the next point, and that is whether Galletly had authority. The appellant has argued that, inasmuch as the point of law that there was no evidence of authority was not taken at the trial, the respondents could not raise in a Court of Appeal a question of law not raised in the Court of first instance. It would require a great deal to persuade me that a Court of Appeal is bound to adjudicate wrongly because it had not occurred to either judge or counsel to raise a point of law in the Court below. The way the appellant seeks to put it is that the Court of Appeal is not in such case asked to decide wrongly, but only to say that the point is one which it is not competent to them to decide at all because it was not argued below. The result, however, is the same. The result of the contention, if it be correct, is that the Court of Appeal is bound to make an erroneous order because a point of law has been overlooked below. It may well be that under the circumstances the Court of Appeal could not justly allow the point of law to be raised. For instance, it may be that if the point had been raised in the Court of first instance the party whose interest it was to dispute it would or could have called evidence which would affect the result. If so, the Court of Appeal would no doubt say that it would not be fair to allow it to be raised. But this is a totally different thing from saying that it cannot be raised.

However, in the present case, what has happened is this. The point of law is whether there was any evidence to go to the jury on the question of authority. The judge was not asked to rule that there was no evidence. The appellant says it cannot be raised now. In the Court of Appeal, however, that point of law was raised and argued and was decided by the Court. In other words, there was

(1) [1901] 2 K. B. 560.

waiver of the right (if it existed) to exclude it from decision. I am not, however, content to stop there. I have read and agree with the judgment of my noble and learned friend Lord Atkinson on this point. I am of opinion that the question was open in the Court of Appeal and is open in this House.

The point, then, is this. To the question "Had Mr. Galletly authority as a manager of a branch of defendant bank to advise the plaintiff, &c.," the jury have answered Yes. The respondents say there was no evidence to support that finding. The Court of Appeal have held that there was no evidence. In my opinion that is right.

The materials, quite shortly stated, consist of a letter of July 6, 1911, and the oral evidence. In my judgment the letter is not capable of a construction which would attribute to it that the general manager was giving to the local manager authority to give assistance or advice in matters of business as distinguished from matters relevant to the wants of a gentleman who was in Canada on pleasure. Being of this opinion, it is unnecessary to say whether, if the general manager had by the letter given authority to give assistance or advice in such a matter as advising upon investments, it would have been within his own authority either himself to bind the bank in such a matter or to give a like authority to a local manager. It is obvious that that is a question which lies at the root of the whole matter, but it seems that that general question was not raised at the trial, and, if it had been raised, it would, of course, have been properly the subject of evidence. I may add, however, that the case seems to me to have proceeded throughout upon the footing that advising upon investments was not in such manner part of the business of bankers as that it would fall without more within the scope of the authority of a manager of the business. Throughout the argument I have been unable to see that the following dilemma was ever recognized or met at the trial. Either advising upon investments was within the business of bankers, or it was not. If it was, then not the head manager only but the local manager within his district would also hold authority to do that business so as to bind his principals. If it was not, then the head manager could not do it, neither could he authorize the local manager to do it. The question whether it was within the scope of the business, therefore,

H. L. (E.) 1918

BANBURY v. BANK OF MONTREAL.

Lord Wrenbury.

lay at the root of the matter. But assuming (without at all suggesting that it is the fact) that the general manager could have given such authority, the letter in my opinion, upon its true construction, did not purport to give it. As regards the oral evidence the matter stands as follows: Mr. Gordon Hewart, who appeared for the plaintiff, disclaimed a general authority in Mr. Galletly to advise at large about investments. He had not cross-examined, he said, for the purpose of suggesting that there were any general instructions to the branch managers to advise about investments or that it was part of their normal duty to advise about investments in general. But, said he, he was putting it to the witness that if in the negotiations dealing with the water company, in which the bank had an interest, the local manager recommends somebody to put his money in, he is doing that in the course of his employment as manager. The proposition is to my mind impossible. The question here is whether from a particular state of facts there is to be implied an authority which was not given expressly. The fact from which the implication is sought to be raised is that the transaction was one in which the bank itself had an interest. The contention, therefore, is that in a case in which the duty and interest of the bank were in conflict there is a presumption that the agent of the bank had authority to advise because the bank itself was interested in a successful issue of the advice. The presumption, of course, is exactly the other way. The jury ought to have been told that the evidence that the bank was itself interested in the matter was evidence against, and not in favour of, an implied authority. At any rate, that is the view which I take of this evidence. There remains only the evidence of Sir F. Williams Taylor. He says that in recommending investments the manager would be exceeding his authority. My Lords, in this state of things, I am of opinion that there was no evidence of authority, and that the Court of Appeal were right in holding that judgment ought to be entered for the defendants.

Under these circumstances no further question arises for decision. The subsequent heads which I detailed, namely, (3.) duty, (4.) negligence, and (5.) damages, all fall to the ground, because the defendants never became bound by anything which Mr. Galletly did in this matter. I may add, however, that in no case could the judgment, in my opinion, have been allowed to stand. The verdict

"25,000*l.* and the securities to be returned to the bank" was an impossible verdict. And, if it were not, the judgment for recovery of 25,000*l.* dropping altogether anything about the return of the securities was a judgment not according to the verdict. There was misdirection in telling the jury that the evidence that the bank was itself interested in the matter was evidence in support of the issue of authority, whereas the direction should have been that it was evidence against it. But it is unnecessary to go further.

My Lords, in my judgment the order made by the Court of Appeal was right: this appeal fails and must be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 25, 1918.

Solicitors for appellant: *William Sturges & Co.*
Solicitors for respondents: *Bischoff, Coxe, Bompas & Bischoff.*

[HOUSE OF LORDS.]

REID, HEWITT AND COMPANY . . . . APPELLANTS;

AND

JOSEPH. . . . . RESPONDENT.

Costs—Trial by Jury—Costs to follow Event—Costs of Issues—Rules of the Supreme Court, Order LXV., *rr* 1, 2.

The expression "the costs shall follow the event" in the second proviso to Order LXV., r. 1, which regulates the costs in jury actions, means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it.

An issue, in this sense, need not go to the whole cause of action,

---

* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD DUNEDIN, and LORD PARMOOR.

H. L. (E.)
1918
REID, HEWITT AND COMPANY v. JOSEPH.

but includes any issue which has a direct and definite event in defeating the claim to judgment in whole or in part.

Myers v. *Defries* (1879, 1880) 5 Ex. D. 15, 180, and *Jones* v. *Curling* (1884) 13 Q. B. D. 262, applied.

Howell v. *Dering* [1915] 1 K. B. 54 distinguished.

Slatford v. *Erlebach* [1912] 3 K. B. 155 discussed.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal affirming a judgment of Bailhache J.

The action was brought by the respondent for 169*l.* 14*s.* 2*d.* for the price of thirty-four bags of goats' hair sold to the appellants.

The appellants, by their defence, pleaded (1.) that the hair, which was sold by sample, was not up to sample and was consequently worth 24*l.* 19*s.* 3*d.* less than it would have been if it had corresponded with the sample; (2.) that there was an overcharge on the bags of 2*l.* 11*s.*; (3.) payment into Court of the balance, 142*l.* 3*s.* 11*d.*

The action was tried before Bailhache J. and a common jury. At the trial the respondent admitted the diminution in the value of the goods by reason of their not being up to sample. As regards the overcharge for the bags the judge withdrew the case from the jury, being of opinion, on the correspondence, that there was an agreed charge for the bags of 2*s.* 6*d.* per bag, and under his direction the jury returned a verdict for the respondent for 144*l.* 14*s.* 11*d.*, being 2*l.* 11*s.* beyond the amount paid into Court. The appellants then applied for the costs of the issue as to the quality of the goods, upon which they had succeeded, but the learned judge refused the application and gave judgment for the respondent for 2*l.* 11*s.* with costs. The appellants appealed against the decision of the learned judge to the Court of Appeal (Lord Cozens-Hardy M.R., Warrington L.J., and Scrutton L.J.) as to the costs, and as to the charge for the bags, but the appeal was dismissed.

Upon the question of the charge for the bags the House dismissed the appeal without calling upon the respondent's counsel.

1918. May 30, 31; June 3. *McCall K.C.* and *J. J. Wright* (with them *G. F. Kingham*) for the appellants: 1. Under the second proviso to r. 1 of Order LXV., which provides that in jury actions the costs shall follow the event, the party who succeeds on any par-

ticular issue gets the costs of that issue, although the general costs of the action go to the other party. The event of an action is complex, and "event" in this connection must be read distributively. The meaning of the proviso is that the general costs of the cause follow the judgment, but that the costs of the particular issues must be respectively taxed in favour of the party who has succeeded on them; and this is in accordance with the old practice under the Common Law Procedure Act: *Myers* v. *Defries* (1); *Davidson* v. *Gray, Barrow & Co.* (2); *Jones* v. *Curling* (3); *Forster* v. *Farquhar* (4); *Hoyes* v. *Tate.* (5) See also *Dunn* v. *South Eastern and Chatham Ry. Co.* (6) "Issue," in this connection, includes any question raised by the pleadings which is material to be submitted to the jury. Here two issues are raised by the defence—(1.) that the goods are not according to sample; (2.) that there was an overcharge upon the bags. The appellants (defendants) are entitled to the costs of the first issue, upon which they have succeeded. The Court of Appeal thought that, because the action was brought upon one contract, there was one issue only, that issue being whether the amount paid into Court was sufficient; but that is a fallacy: *Wagstaffe* v. *Bentley* (7); *Slatford* v. *Erlebach.* (8) In *Howell* v. *Dering* (9) Buckley L.J. defines "issue" for the purposes of this rule as "that which, if decided in favour of the plaintiff, will in itself give a right to relief, or would, but for some other consideration, in itself give a right to relief; and if decided in favour of the defendant will in itself be a defence."

2. A fortiori the judge had no power to order the appellants to pay the costs of an issue upon which they were successful: *Davies* v. *Edinburgh Life Assurance Co.* (10)

Tindal Atkinson K.C. and *Frank Gover* for the respondent. 1. The dispute as to the quality of the goods in this action was not an issue for the purpose of the construction of "event" in r. 1, inasmuch as it was not decisive of the whole action but went to quantum only. "Issue" in this connection means something which

(1) 5 Ex. D. 15, 180.
(2) (1879) 5 Ex. D. 189, n.
(3) 13 Q. B. D. 262.
(4) [1893] 1 Q. B. 564, 567.
(5) [1907] 1 K. B. 656.
(6) [1903] 1 K. B. 358.
(7) [1902] 1 K. B. 124.
(8) [1912] 3 K. B. 155.
(9) [1915] 1 K. B. 54, 62.
(10) [1916] 2 K. B. 852.

H. L. (E.) 1918 REID, HEWITT AND COMPANY v. JOSEPH.

goes to the root of the action : *Howell* v. *Dering*. (1) The only issue in this action was as to the sufficiency of the payment into Court. The difficulty has arisen from the unnatural straining of the word "event" in r. 1. *Myers* v. *Defries* (2) is distinguishable, because in that case there were two separate causes of action, and the case stands on the same footing as if two actions had been brought. The only issue in this action was as to the sufficiency of the payment into Court. The same construction must be given to "issue" in connection with "event" as to the word "issue" in r. 2. Since the introduction of that rule there is no reason for giving "event" the forced construction which has been adopted in some instances by the Courts.

2. This case falls, not under r. 1, but under r. 2. "Event" in r. 1 refers to the final decision of the action : *Garnett* v. *Bradley*. (3) Then comes r. 2, which was introduced in 1890, and was designed for the purpose of preventing injustice under r. 1, and applies to issues raised in the course of the action, the costs of which would otherwise have gone to the party who succeeded in the action. In this rule the words of limitation, "for good cause shown," are absent, and there may be very good grounds for leaving these costs in the unrestricted discretion of the judge. The learned judge was therefore entitled in his discretion to order the appellants to pay all the costs.

The House took time for consideration.

July 5. LORD FINLAY L.C. My Lords, this case was tried with a jury, and the question upon this appeal is as to the effect on costs of the proviso at the end of Order LXV., r. 1, of the Rules of the Supreme Court. The amount at stake is small, but the question must arise in many other cases, and is therefore of importance.

The action was brought by the respondent against the appellants to recover 169*l*. 14*s*. 2*d*. for the balance of account for goods sold and delivered. The goods consisted of a quantity of goats' hair and thirty-four bags in which the hair was packed. The defendants, by way of defence, alleged, first, that the hair was sold by sample and

(1) [1915] 1 K. B. 54, 62-3, 66. (2) 5 Ex. D. 15, 180.
(3) (1878) 3 App. Cas. 944, 950.

was inferior in quality to the sample, and was worth 24*l.* 19*s.* 3*d.* less than if the hair had corresponded with the sample; second, that the bags were charged at 2*s.* 6*d.* as the agreed price, but that there was in fact no such agreement, and that the bags were worth only 1*s.* per bag, and that this, on the thirty-four bags, constituted an overcharge of 2*l.* 11*s.*; third, as to the balance, 142*l.* 3*s.* 11*d.* (after deducting from the sum claimed the 24*l.* 19*s.* 3*d.* and the 2*l.* 11*s.*), payment into Court of that sum.

The case was tried before Bailhache J. with a jury. It was admitted by the respondent (the plaintiff) at the trial that the hair was not equal to sample, and was on this account of less value by 24*l.* 19*s.* 3*d.* The defence as to the price of the bags broke down, as the appellants (defendants) had agreed to the price (2*s.* 6*d.* per bag). Under these circumstances the following judgment was given by Bailhache J.: "This action having on July 15, 1916, been tried before the Honourable Mr. Justice Bailhache with a common jury of the West Riding of the county of York, and the jury having found a verdict for the plaintiff for the sum of 144*l.* 14*s.* 11*d.*, including the sum of 142*l.* 3*s.* 11*d.* paid into Court under paragraph 4 of the defence, and the said the Honourable Mr. Justice Bailhache having ordered that judgment may be entered for the plaintiff for 2*l.* 11*s.*: Therefore it is adjudged that the plaintiff recover against the defendant 2*l.* 11*s.* and his costs to be taxed." The learned judge made no special order that the costs should be dealt with otherwise than is provided in r. 1 of Order LXV., and the question now is whether the appellants are entitled to the costs which were incurred with reference to the question whether the goods were up to sample, on which question they had succeeded. It was contended for the respondent that as he had recovered 2*l.* 11*s.* beyond the amount paid into Court he was entitled to the costs of the action on the wording of the rule, and that in these costs should be included the costs incurred on the question whether the goods were according to sample, as to which he had failed. Bailhache J. adopted this view, and he was affirmed by the Court of Appeal (Lord Cozens-Hardy M.R., Warrington L.J., and Scrutton L.J.). The present appeal to your Lordships' House asks that the appellants should have these costs. The appellants also asked on this appeal that judgment should be entered for them

H. L. (E.) 1918 REID, HEWITT AND COMPANY v. JOSEPH. Lord Finlay L.C.

as to the 2*l.* 11*s.*, the alleged excess in the price of the bags, but your Lordships did not think it necessary to call upon the respondent on this point. The appeal, therefore, is narrowed down to the question of the costs relating to the sample on which the appellants had succeeded at the trial.

Order LXV., rr. 1 and 2, are as follows :—Rule 1 : " Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge : Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division : Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall, for good cause, otherwise order." Rule 2 : " When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event. And an order giving a party costs except so far as they have been occasioned or incurred by or relate to some particular issue or part of his proceedings shall be read and construed as excluding only the amount by which the costs have been increased by such issue or proceedings, but the court or judge, if the whole costs of the action are not intended to be given to the party, may, wherever practicable, by the order direct taxation of the whole costs, and payment of such proportion thereof as the court or judge shall determine." It is obvious that the word " issue," where it occurs in Order LXV., r. 1, denotes a proceeding in the nature of an interpleader issue or an issue directed as to some particular question in a case or matter set down for trial by jury. The word " issue " has, of course, another sense altogether in r. 2, and there denotes any issue arising on the pleadings in an action or other proceeding. The consideration of " issue " in this latter sense is relevant to Order LXV., r. 1, in considering the meaning of the provision that costs shall follow the event.

The points argued at the Bar of your Lordships' House were two

—(1.) as to the meaning of the proviso at the end of r. 1 that the costs shall follow the event, and (2.) as to whether the costs incurred on the defence as to inferiority to sample were costs of an issue so as to entitle the party who succeeded thereon to recover these costs.

1. On the first of these two questions the appellants contended that the expression in the proviso to r. 1 "the costs shall follow the event" means that a defendant who succeeds on certain issues is to have the costs of these issues, even though he has been adjudged on the whole liable to the plaintiff in the action. It is conceded in this case that, as the appellants had been found liable to the plaintiff in 2*l.* 11*s.* and had been adjudged to pay that sum and his costs to be taxed, they must pay to the respondent, as the successful plaintiff, the general costs of the cause, but the appellants deny that they are liable to pay the costs of the inquiry as to the sample, on which they had succeeded, and assert that, on the contrary, they are entitled as against the respondent to such costs as those of an issue in which they have succeeded. The respondent, on the other hand, contends that the event mentioned in the proviso is the event of the cause as a whole, and that, as the plaintiff has succeeded in recovering judgment for 2*l.* 11*s.*, he is entitled, as part of his costs, to the costs of the inquiry as to the sample.

To solve this question it is necessary to follow to some extent the history of the law as to costs. Before the Judicature Acts the costs at common law followed the event in this sense, that, while the party who had on the whole succeeded in the action got the general costs of the action and of any issues on which he had succeeded, the costs of any issue on which the other party had succeeded were recovered by him. Sect. 81 of the Common Law Procedure Act, 1852, which in substitution for earlier provisions allowed the pleading of several matters, provided that the costs of any issue either in fact or law should follow the finding or judgment upon such issue, and this was worked out by r. 62 of the Regulae Generales of Hilary Term, 1853, which were made under the Act and will be found in Day's Common Law Procedure Act (3rd ed.), beginning at p. 347. The first two Judicature Acts were passed in 1873 and 1875, and to the second of these were annexed in Sched. I. certain rules, one of which was Order LV., corresponding to the present Order LXV., r. 1, which replaced it in 1883. In these Rules of 1875 there was nothing

H. L. (E.) 1918 REID, HEWITT AND COMPANY v. JOSEPH. Lord Finlay L.C.

to correspond to r. 2 of the Rules of Court now in force. From 1875 to 1883 the old practice as to costs continued to be in force so far as it was not inconsistent with Order LV. It was in 1883 that r. 2 was first introduced, and it then consisted merely of the first sentence of r. 2 as it now stands. The second sentence of r. 2 as it now stands was added in 1902—the first half of it in January of that year and the remainder in July. Rule 2 is merely declaratory of the practice which was in use before that rule was made. Order LV. of 1875 was, for the purposes of the present case, identical in its effect with the present Order LXV., r. 1; it ran as follows: "*Costs.*—Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity: Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the judge before whom such action or issue is tried or the Court shall otherwise order."

The great change made by Order LV. of 1875 was that the costs were put in the discretion of the Court, but an exception was made in case of trial by jury, as it was provided at the end of the order that where any action, or issue is tried with a jury the costs should follow the event, unless the judge or Court should for good cause otherwise order. This proviso was obviously introduced for the purpose of preserving in jury cases the old practice as to costs. It was no doubt apprehended that if the discretion of the judge as to costs applied to such cases the result might be that a judge who had taken a strong view against the party in whose favour the jury found might exercise his discretion as to costs in such a way as to deprive the successful party to a great extent of the fruits of victory, or possibly throw costs upon him. The expression "costs shall follow the event" had a definite meaning and imported that the costs of the several issues went to the party who succeeded upon them respectively, while the general costs went to him who on the whole succeeded in the action. I cannot doubt that this is the sense in which the expression was used in Order LV. The object was not

to alter, but to preserve, the old practice in jury cases. If the proviso to Order LV. were read as providing that the costs were to follow the event in the sense of giving the costs of all the issues to the party who had recovered something in the action while he had failed upon most of the issues, it would have introduced a startling novelty while its object was to keep up the old practice as to costs. Such an alteration would, moreover, in its working have been inequitable, and it cannot be supposed that, without any reason for it, an innovation of this kind was contemplated by those who framed it or by the Legislature which sanctioned the order. It is not to the purpose to argue that the injustice which would arise under the order so construed might be corrected by the exercise of the special power to order otherwise for good cause conferred upon the judge of the Court.

It was conceded by the respondent that if there were several separate causes of action comprised in one action a plaintiff who had failed on the issues raised in respect of some of these causes of action would have to pay the costs of those issues to the defendant who had succeeded thereon, although the plaintiff had succeeded in the action on the other causes of action therein comprised. This admission the respondent felt constrained to make, as it was so decided by a very strong Court in *Myers* v. *Defries* (1), and it is fatal to the contention that the event mentioned in the proviso means the event of the action and that alone. In the case supposed there is but one action, although matters which might have formed the subject of several actions are comprised in it, and no reason can be suggested why, on the respondent's view of the meaning of "costs following the event," the successful plaintiff should not get the costs of all the matters comprised in that one action. There is, it is said, but one event. If so, that would apply in cases of issues relating to several causes of action comprised in one writ as well as to the costs of several issues in one action in which only one cause of action is sued on. The principle is exactly the same, and every argument in support of the conclusion in *Myers* v. *Defries* (1) applies to the case of several issues arising under one cause of action. It was in 1880 that the construction of Order LV. came under consideration in *Myers* v. *Defries* (2) in the Divisional Court and afterwards in the Court of Appeal. (1)

(1) 5 Ex. D. 180. (2) 5 Ex. D. 15.

H. L. (E.) 1918 REID, HEWITT AND COMPANY v. JOSEPH. Lord Finlay L.C.

Pollock B. in the Divisional Court, in giving the judgment of the Court, pointed out (1) that Order LV., by placing costs in the discretion of the Court, had superseded the old rule that the costs followed the event, but went on to say that in construing Order LV. regard should be had to what had been the practice prior to the Judicature Acts. He states the intention of Order LV. as follows: "We think it is that where by the statement of claim and statement of defence, or any further pleadings, more than one definite issue is raised and determined by the judge and jury by whom the action is tried, and no order otherwise is given by the judge, the word 'event' is to be construed distributively, and if in the same action the plaintiff obtains a verdict and judgment as to one distinct cause of action, and the defendant obtains a verdict and judgment as to another cause of action, these are two events, and the master is to tax the costs accordingly." He points out at p. 18 that in the case under consideration there were three distinct causes of action, as to one of which the plaintiff succeeded while the defendant succeeded as to two, and that the costs must be distributed accordingly.

Although the particular case with which Pollock B. was dealing was one of distinct causes of action comprised in one writ, the language used in his judgment implies, I think, that the same result would be arrived at if there were more than one definite issue raised with reference to one cause of action, and the judgments in the Court of Appeal, especially that of Thesiger L.J., bear this out. Bramwell L.J. says (2): "Independently of the decision of the House of Lords in *Garnett* v. *Bradley* (3), I quite agree that the old law as to costs is gone; but we may look upon it as a guide, for the former rules as to apportioning the liability for costs were in themselves reasonable and ought to be followed wherever it is practicable." On p. 185 he points out that where the plaintiff relies upon several grounds of suit there may be several events, and that in his opinion "event" in Order LV. must be read as nomen collectivum. Baggallay L.J. agreed, and Thesiger L.J. reviewed the whole subject in a passage which (like everything proceeding from that most distinguished judge during his too brief judicial career) is a model of completeness and accuracy. So far as I am aware it has never been

(1) 5 Ex. D. 17. (2) 5 Ex. D. 184.
(3) 3 App. Cas. 944.

dissented from, and I adopt it as expressing my own views on the subject (1): "I will briefly allude to the practice as to costs followed in the Courts of Common Law before the Supreme Court of Judicature Acts, 1873, 1875. Under the Common Law Procedure Act, 1852, s. 41, except replevin and ejectment, causes of action, by and against the same parties in the same rights, might be joined in the same suit. Pursuant to the provisions of that and other statutes, the defendant might, as regards some defences without and others with leave, plead several defences. The plaintiff, if he succeeded as to any of the causes of action alleged by him, was entitled to the general costs of the cause, although this right, if the damages recovered were small, was controlled to some extent by certain statutes, such as 43 Eliz. c. 6, s. 2; 21 Jac. 1, c. 16, s. 6; 3 & 4 Vict. c. 24, s. 2; and the statutes relating to the county courts, the most recent of which was the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5. The defendant, however, was entitled to all the costs of the issues as to which he obtained the verdict. The expression 'to follow the event,' or 'to abide the event,' was, in regard to costs, an expression in common use in agreements of reference; and when costs of the cause were expressed to follow or abide the event, they would have been distributed in the manner I have described. Under the Supreme Court of Judicature Acts, 1873, 1875, the power conferred upon a plaintiff of joining distinct causes of action is regulated by Order XVII., and it may be remarked that the rules of that order certainly do not limit the right previously existing under the Common Law Procedure Act, 1852. Again issues may have been done away with in the old sense of the word strictly used; but in a very similar sense they still remain. Their existence is clearly contemplated by Order XIX., rules 18, 21; Order XXVI.; and Order XXXVI., rules 26, 27, 29. No doubt, before the Judicature Acts, 1873, 1875, besides issues occurring in an action at common law, there were issues which did not so arise: as, for instance, issues of interpleader, and issues directed by the Court of Chancery and by the Court of Probate under 20 & 21 Vict. c. 77, s. 35; but the orders, which I have mentioned, clearly relate to issues arising in an action brought in the High Court. This being so, it is reasonable to suppose that the legislature would leave unaltered a practice as to the

1) 5 Ex. D. 187–8.

H. L. (E.) 1918 REID, HEWITT AND COMPANY v. JOSEPH. Lord Finlay L.C.

taxation of costs upon issues arising in an action where it did not appear that the practice required to be amended. Now by Order LV. the practice as to costs formerly prevailing in the Court of Chancery is introduced into the Common Law divisions of the High Court, and they are placed in the discretion of the Court, but subject to the proviso as to trials by a jury, which directs that unless the judge or Court shall otherwise order, costs shall follow the event. This proviso may be construed in more modes than one. It may be argued that if the plaintiff succeeds as to any part of his claim, he is entitled to all the costs, although he has failed as to material portions of his claim; and it may also be argued that if each party partly succeeds, neither is to have any costs. Either of these contentions if acceded to would be sufficient to deprive the defendants of their costs: but I cannot think that either is right. It appears to me more reasonable to give to the language used the meaning which it bore prior to the Judicature Acts. The 'event' of an action is complex, and the word, as used in the proviso to Order LV., may be read distributively; it must be so read as regards distinct causes of action according to the view of the Exchequer Division, and, in my opinion, the general costs of the cause follow the judgment, but the costs of the particular issues must be respectively taxed in favour of the party who has succeeded on them. I am glad to know that this view is in accordance with the practice which has been followed, and that it is to some extent supported by the authorities decided, since the Judicature Acts." The contention of the respondent that in the rule in question the words "the costs shall follow the event" referred to the event of the action as a whole, and not to the events of separate issues, except in the one case where they relate to separate causes of action, as in *Myers* v. *Defries* (1), is quite inconsistent with the terms of the judgment of Thesiger L.J., which lays it down that the same result will follow wherever there are separate issues although arising under one cause of action only, and any such contention seems to me unreasonable in itself.

In *Ellis* v. *Desilva* (2) a question arose as to the meaning of a provision in an order of reference that the costs should follow the event. The action had been brought to recover 169*l*., the balance of the contract price of two houses built by the plaintiff for the

(1) 5 Ex. D. 15, 180. (2) (1881) 6 Q. B. D. 521.

defendant. There were various defences and a counter-claim for delay in building and for bad work. The case, after the pleadings had been completed, was referred, together with all matters in defence, to an arbitrator on the terms that the costs of action, reference, and award should follow the event. The arbitrator made an award giving 3*l.* 2*s.* 6*d.* to the defendant in respect of the action and matters in difference, and saying nothing whatever about costs. A summons was taken out to have the award remitted to the arbitrator to find specific issues in order that the costs might be apportioned. The Queen's Bench Division made the order, and on appeal it was confirmed by the Court of Appeal. During the argument it was contended for the defendant that the use of the word "event" got rid of all questions as to specific issues, while for the plaintiff it was argued that the event must be read distributively. Bramwell L.J., who had during the argument remarked that under the present system of pleading it must sometimes be a very difficult matter to eliminate the issues, said, when he came to deliver judgment (1), that it was argued on behalf of the plaintiff that the "event" ought to be read distributively as if the term "events" had been employed and that the Court below had so found, and went on to say: "It cannot be denied that this is the general interpretation of the term, and I see nothing in this particular case to make another interpretation the correct one. I am of opinion that the plaintiff's contention is right, and that the reason of the thing is to treat 'event' distributively." No reason can be suggested for giving the words "follow the event" in Order LXV., r. 1, any meaning other than that which Bramwell L.J. here said was the general interpretation of the term.

In 1884 the question of "issues" was considered with reference to an action of ejectment in which six closes were claimed—*Jones* v. *Curling*. (2) The case was tried with a jury, and the plaintiff succeeded as to some of these closes, the defendant as to others. Lord Coleridge C.J., before whom the case was tried, made a special order under Order LXV., r. 1, that the costs of both parties should be taxed, added together, and divided. The plaintiff appealed, and the Court of Appeal set the order aside on the ground that there was no injustice in letting the costs follow the event, inasmuch as that

(1) 6 Q. B. D. 524. (2) 13 Q. B. D. 262.

H. L. (E.) 1918 REID, HEWITT AND COMPANY v. JOSEPH. Lord Finlay L.C.

expression must be construed distributively, so that the plaintiff would get the costs of the issues on which he succeeded, together with the general costs of the cause, while the defendant would get the costs of the issues on which he succeeded. Brett M.R. said (1): "Now if the costs were to be taxed, as it has been said they must be taxed, as if the action were to be treated as only one issue, and the plaintiff had succeeded on that issue, and was therefore entitled to the whole costs of all the witnesses and briefs to the full extent, and nothing at all was to be allowed to the defendant, I think that would, under the circumstances, work injustice." He then went on to explain how the costs, if taxed in the ordinary way, would fall: "I am of opinion that even before the Judicature Act (whatever may have been the practice in the Masters' offices), where in ejectment claims were made for different parcels of land under separate demises, the question with regard to each was always treated as a separate issue, and if the jury found for the plaintiff on one and for the defendant on the other, the judgment was so entered, and the costs were taxed as upon findings by a jury on separate issues. Then with regard to the question whether this would be the same before the Judicature Act if the different parcels were claimed under one demise, the case of *Alcock* v. *Wilshaw* (2), which was decided in 1860, seems to me an authority for saying that even in that case if the plaintiff succeeded in respect of certain closes, and the defendant succeeded in respect of certain other closes, the verdict would be entered distributively for the plaintiff for those parcels to which he had shewn he was entitled, and for the defendant for the others; and I have no doubt if under those circumstances the costs were properly taxed they would have been taxed as upon a finding of separate issues. It has been suggested that the Masters did not tax on that principle. If they did not, in my opinion this practice was a bad one, and a bad practice in taxing costs cannot give jurisdiction. But since the Judicature Act I have not the least doubt that the action for the recovery of land must be treated as all other actions, and that if the plaintiff claims in respect of certain closes, and the defendant in his defence does not counterclaim, but relies on the fact of his being in possession, and puts the plaintiff to the proof, separate issues are raised as to each and every part of the plaintiff's

(1) 13 Q. B. D. 269. (2) (1860) 6 Jur. 628.

claim, although it is in form one only, so that the closes in respect of which the jury find the plaintiff claims rightly form one issue and the closes in respect of which the jury find he claims wrongly form a separate issue; and, therefore, without any further instructions to the Master, the proper way of taxing the costs upon such findings is to tax the costs as if those findings were in respect of separate issues. If that be the proper mode of taxing the costs, as I hold that it is, then I can see no injustice caused by this verdict, even though the plaintiff practically succeeds as to half only, and the defendant practically succeeds as to the other half." Bowen L.J. concurred with the Master of the Rolls on every point, and Fry L.J. was of the same opinion.

This is a direct decision of a very strong Court that in Order LXV., r. 1, the words "follow the event" must be considered distributively, and that the construction contended for by the respondent in the present case would cause such injustice that it would call for a special order under the proviso to correct it.

In the case of *Lund* v. *Campbell* (1) the question was (as in the case of *Ellis* v. *Desilva* (2), already quoted by me) as to the construction in an order of reference of the provision that the costs should "abide the event." There was a claim and a counter-claim. The arbitrator found that after deducting what was due to the plaintiff on the claim from what was due to the defendant on the counter-claim there was a balance due to the defendant. It was held that the word "event" must be construed distributively, that the defendant must have judgment for the costs of the action, reference, and award, and that the plaintiff was entitled to the costs of the issues found in his favour. Lord Coleridge C.J. said that two principles were established by the cases: (1.) that the party who on the whole succeeds is entitled to general costs; (2.) that the word "event" is to be construed distributively, and that the costs of the issue as to which the party who on the whole is unsuccessful has been successful are to be allowed to him. The other members of the Court (Sir James Hannen and Lindley L.J.) concurred and the costs were distributed accordingly. This case was decided on March 12, 1885, and on March 26 of the same year the same

(1) (1885) 14 Q. B. D. 821. (2) 6 Q. B. D. 521.

H. L. (E.)
1918
REID, HEWITT AND COMPANY v. JOSEPH.
Lord Finlay L.C.

construction was adopted with regard to an order of reference in the case of *Hawke* v. *Brear* (1), Mathew J. and Smith J. remarking that the other construction would be unreasonable. No reason has been suggested for giving to the words " shall follow the event " in Order LXV., r. 1, a meaning different from that given to precisely similar words in orders of reference in *Ellis* v. *Desilva* (2), in *Lund* v. *Campbell* (3), and in *Hawke* v. *Brear* (1), and from the meaning put on the words of the rule itself in *Myers* v. *Defries* (4) and *Jones* v. *Curling*. (5)

The rule as laid down in the cases above cited was applied in *Wagstaffe* v. *Bentley* (6), a case which arose on Order XXII., rr. 1 and 6, before the addition made to the latter of these rules in August, 1913. There were in an action for negligence a denial of negligence, an allegation of contributory negligence, and a payment into Court with a denial of liability. The plaintiffs succeeded as to negligence and contributory negligence, but the jury found that the sum paid into Court was more than sufficient to meet the claim for damages. It was held that the questions as to negligence and as to the sufficiency of the payment into Court were distinct issues and that the plaintiffs were entitled to their costs on the issues as to negligence on which they had succeeded. All the members of the Court (Collins M.R., Stirling L.J., and Mathew L.J.) point out that there were separate issues, and Stirling L.J. says that two issues were found for the plaintiff on the allegations of negligence and contributory negligence, while Mathew L.J. says the same thing. In August, 1913, words were added to Order XXII., r. 6, directing that in such cases the defendant should not have his costs of the issue as to liability unless the judge thought there was reasonable ground for not accepting the sum paid in. Upon this addition to the rule was decided the case of *Davies* v. *Edinburgh Life Assurance Co.* (7), in which it was held that the words so added gave no power to the judge to make the plaintiff pay the costs of the issue on which he had succeeded. It will be noted that in the case now under appeal the Court of Appeal has not only refused the defendants the costs on a

(1) (1885) 14 Q. B. D. 841.
(2) 6 Q. B. D. 521.
(3) 14 Q. B. D. 821.
(4) 5 Ex. D. 15, 180.
(5) 13 Q. B. D. 262.
(6) [1902] 1 K. B. 124, 127, 128.
(7) [1916] 2 K. B. 852.

question on which they had succeeded, but has actually ordered them to pay the costs on that question to the plaintiff.

The last authority I shall refer to on this part of the case is *Slatford* v. *Erlebach*. (1) The action was for a debt. The defendant denied that anything was due, and pleaded that the debt was barred by the Statute of Limitations. It was found that there was a balance due, but that it was barred by the statute. It was held that the plaintiff, having succeeded in establishing the debt, had succeeded in an event within the meaning of Order LXV., r. 1, and was therefore entitled to the costs of that issue. Vaughan Williams L.J. said (2) that it was plain there was an event upon the issue as to the existence of the debt on which the successful party was entitled to his costs, although he had recovered nothing owing to the defence on the statute. Buckley L.J. said (3): "I think that the one issue seriously raised and fought was as to the existence of a debt; it follows that the plaintiff, who succeeded upon that issue, is entitled to his costs in respect of it."

Upon this part of the case the authorities are all one way. They all decide that the words "the costs shall follow the event" mean that the costs are to be distributed according to the results of the several issues, while the party who is successful on the whole gets the general costs. I apprehend that your Lordships would be slow to overrule a long series of decisions on a point of practice in which the Court of Appeal has uniformly decided against the respondent's contention, even if it were open to doubt. It appears to me, however, that, even if there were no authority on the question, the respondent's contention is on this point manifestly erroneous on the history of the law of costs and the language of the rule.

2. The second question in the case is whether the costs incurred on the point as to whether the goods were equal to sample are costs of an issue so as to entitle the party who succeeded upon it to recover these costs in the absence of an order to the contrary made by the judge or Court. The first observation which occurs on this part of the case is that it would have been perfectly open to the defendants to have raised the question of inferiority to sample by

(1) [1912] 3 K. B. 155. (2) [1912] 3 K. B. 160.
(3) Ibid. 161.

H. L. (E.) 1918 REID, HEWITT AND COMPANY v. JOSEPH. Lord Finlay L.C.

counter-claim instead of pleading it by way of defence in reduction of the price. The defendants would have succeeded on such a counter-claim, and it could not possibly have been contended that they, in that event, would not have been entitled to the costs of the counter-claim. These costs would have been the same as those incurred under the allegation in the defence that the goods were inferior to sample. It would indeed be extraordinary if the different form of raising the question led to a different result as regards the costs incurred. So to hold would amount to the triumph of technicality over substance. This appears to me to be a very strong reason for holding that the defendants are entitled to the costs of this part of the defence just as much as if they had raised it by counter-claim.

The contention put forward by the respondent was that the question of inferiority to sample did not go to the whole cause of action, and for this reason it could not be an issue. The defendants here pleaded, first, that the goods were worth 24*l.* 19*s.* 3*d.* less than if they had been equal to sample; second, that there was an overcharge upon the bags amounting to 2*l.* 11*s.*; third, that as to the balance of the claim they brought the amount, 142*l.* 3*s.* 11*d.*, into Court. These three allegations allege a defence to the whole claim. The first of these allegations was proved. It is said that the defendants are not entitled to the costs on the first allegation, on the ground that it did not go to the whole cause of action, and therefore was not an issue. This contention appears to be erroneous in point of principle. The defendants may raise a defence to the whole claim or to any part of the claim. If the claim is for 300*l.*, the price of goods sold and delivered, the defendants may plead that the goods were not according to sample and were wholly worthless. This would raise but one issue going to the whole cause of action. They might, on the other hand, plead as to 100*l.*, parcel of the claim, payment before action, as to another 100*l.* a set-off, and as to the balance that the goods were not according to sample and were for that reason worth 100*l.* less than the contract price. Each of these defences would constitute an issue by itself, and the three defences between them would constitute a defence to the whole claim, but the issues are separate. The costs of these issues would, where the case had been tried by a jury, go to the party who succeeded on each issue,

and the defendants, if they succeeded on all the three issues, would also get the general costs, because they would have established a defence to the whole cause of action. If the defendants failed in completely establishing any one of the three issues, there would be a balance recoverable by the plaintiff, who would get the general costs of the action as distinguished from the costs of particular issues. No reason has been suggested for confining the term "issue" to the case of a defence going to the whole cause of action, and it appears to me that it would be contrary to principle so to hold. There may be issues as to a part of the sum claimed in the action as well as to the whole of it, and the defence as to sample in this case constituted such an issue.

As to the cases, the balance of authority appears to me to be against the respondent's contention on this point. It was rejected by the Court of Appeal in *Hubback* v. *British North Borneo Co.* (1) In that case the action was for wrongful dismissal, and the plaintiff claimed, inter alia, nine months' half-pay, while it was contended on the other side that he was entitled only to six months' half-pay. The jury found a verdict for the plaintiff for 781*l.*, but the Court held that he was entitled to less than the 500*l.* paid in, while they decided the issue as to the right to six or nine months' half-pay in favour of the plaintiff. The judgment in the Court of Appeal was delivered by Vaughan Williams L.J. and Stirling L.J., and Cozens-Hardy L.J. concurred. It deals thus with the contention that the plaintiff was not entitled to the costs of this issue (2): "It is said that the reason why the defendant company ought not to be ordered to pay the costs of those issues on which they have failed in accordance with the decision in *Wagstaffe* v. *Bentley* (3) is this—that in *Wagstaffe* v. *Bentley* (3) the issues as to which the defendant failed were issues going to the whole cause of action, and that under those circumstances it was right that the defendant, although he had paid more than sufficient into Court, should have to pay the costs of those issues, whereas in the present case the defendant company have not been defeated on any issue going to the whole cause of action; and it is contended that under those circumstances they have not been defeated as to any defence and ought not to be made to pay any

(1) [1904] 2 K. B. 473. (2) [1904] 2 K. B. 476.
(3) [1902] 1 K. B. 124.

H. L. (E.) 1918 REID, HEWITT AND COMPANY v. JOSEPH. Lord Finlay L.C.

costs. I see nothing in the authorities to compel us to come to such a conclusion. In my opinion good sense would lead us to the conclusion, if we are at large in the matter, that the defendant company ought to bear the costs of any issue as to which they have failed. In this case it is the issue as to six months' or nine months' pay. So far from there being anything in the Judicature Acts or in the Rules to prevent us from doing this, I think that Order LXV. shews the contrary."

It was suggested in the case of *Howell* v. *Dering* (1) that in *Hubback's Case* (2) the Court of Appeal was exercising the discretion of the judge at the trial, having been asked to make a special order as to the costs, and that the Court had to decide what order ought in its discretion to be made as to costs. I do not so read the report, and indeed, if these suggestions were right, all the observations of Vaughan Williams L.J. as to what constitutes an issue would have been irrelevant, as discretion as to costs may be exercised with regard to any part of the costs, whether it relates to an issue or not, apart from Order LXV., r. 1: see *Forster* v. *Farquhar*. (3) *Hubback's Case* (2) had been tried by a jury, and Vaughan Williams L.J. refers to Order LXV. In any case the observations of Vaughan Williams L.J. negative the contention of the respondent that an issue must go to the whole cause of action. So in *Hoyes* v. *Tate* (4) there was an action for trespass on the plaintiffs' land, causing damage to a fence and a tree, and the jury found that the tree was the property of the defendants. The defendants appealed to the Court of Appeal from the refusal of the judge to direct judgment to be entered for them upon the issue as to the ownership of the tree. The Court of Appeal (Collins M.R., Cozens-Hardy L.J., and Fletcher Moulton L.J.) directed that judgment should be drawn up so as to give the defendants the costs of the issue as to the ownership of the tree. This was not a separate cause of action, as was suggested in *Howell* v. *Dering* (5), but part of the question as to trespass.

It is obvious in the present case that the defence of inferiority to sample was pleaded only to a portion of the plaintiff's claim, namely,

(1) [1915] 1 K. B. 54, 59, 64.
(2) [1904] 2 K. B. 473.
(3) [1893] 1 Q. B. 564.
(4) [1907] 1 K. B. 656.
(5) [1915] 1 K. B 54, 64.

24*l.* 19*s.* 3*d.* The defendant may plead defences, each going only to a part of the claim, and each constitutes an issue. The question is whether an answer is shown to the part of the claim to which it is pleaded. The defendants here failed in making out a defence to the whole claim as they were defeated on the issue as to the price of the bags, but they succeeded on the issue as to inferiority to sample, reducing the value of the goods by 24*l.* 19*s.* 3*d.* The judge at the trial is the proper person to decide whether there are separate issues on which the party unsuccessful in the action is entitled to his costs : *Bush* v. *Rogers* (1) ; but as the question is one of law, and not of discretion, his decision would be subject to appeal.

The case of *Howell* v. *Dering* (2) requires some consideration. This was an action to recover damages in respect of a prospectus alleged to be fraudulent. There were a number of defendants, one of whom was the broker to the company (Dering). He set up by way of defence that he had nothing to do with issuing the prospectus, and this the jury found was true. He further pleaded by way of defence that he had no knowledge of, and did not admit, any of the remaining allegations in the statement of claim. One such allegation was that the prospectus contained misstatements, and another that the plaintiff had taken his shares in reliance on these statements. The case was compromised as regards all the other defendants, but went to the jury as regards Dering. The jury found that the prospectus contained untrue statements on material facts, and that the plaintiff had taken his shares on the faith of them. The plaintiff claimed to have the costs of the issues as to the truth of the prospectus, and his having acted upon it, on the ground that he had succeeded upon them. The judge gave him these costs, but the Court of Appeal set the order aside on the ground that the questions of the truth of the prospectus and the plaintiff's acting upon it were not issues. This decision does not touch the question whether a defence in order to constitute an issue should go to the whole cause of action, and is, therefore, not in point for the present purpose. I reserve the expression of any opinion upon the decision itself, or upon the dicta which occur in the judgments as to what constitutes an issue, until they come before this House for decision, if they ever do.

(1) [1915] 1 K. B. 707. (2) [1915] 1 K. B. 54.

H. L. (E.) 1918 REID, HEWITT AND COMPANY v. JOSEPH. Lord Finlay L.C.

The reasons given for the judgment of the Court of Appeal do not appear to me satisfactory. The Master of the Rolls gives as his reason that there was one contract only. I have already dealt with this point. To constitute separate issues it is not necessary that there should be separate causes of action. Warrington L.J. adds to this that there was only one question, namely, whether the defendant had paid enough into Court. This appears to me not to be accurate. There is, first, the question whether a reduction in value is shown by reason of inferiority of the goods to sample, and upon this largely depends the question whether the payment into Court was sufficient. This is in its nature a separate issue. Scrutton L.J. says that "issue" in Order LXV., r. 1, means a proceeding like interpleader issue, and that this has resulted in favour of the plaintiff, and that therefore the costs follow the event, unless the judge for good cause otherwise orders. I agree as to the meaning of the word "issue" as it occurs in Order LXV., r. 1. It denotes a proceeding like an interpleader issue, but this has no bearing upon the question whether there have been "issues" in the action which have been found in favour of the defendant.

Upon the whole I am of opinion that this appeal ought to be allowed with costs here and below.

VISCOUNT HALDANE. My Lords, I sympathize with Bramwell L.J. in the observation he made in his judgment in *Myers* v. *Defries* (1) to the effect that the language of the old Order LV., r. 1, substantially reintroduced by the present Order LXV., r. 1, is unfortunate. The effect of the earlier part of the order is to repeal the old law and to put costs in the discretion of the Court or judge, but from this principle a departure is made by the proviso that "where any action, cause, matter, or issue, is tried with a jury," the costs are to follow the "event" unless the judge who tries the case, or the Court, shall for good cause otherwise order. This departure from the general principle is aggravated by r. 2 of the same order, which applies to all issues in law or fact, whether tried with a jury or not, and provides that the costs, unless otherwise ordered, shall follow the event. It goes on to say that an order giving a party costs, except so far as

(1) 5 Ex. D. 180.

they have been occasioned or incurred by or relating to some particular issue or part of the proceedings, shall be read and construed as excluding only the amount by which the costs shall have been increased by such issue or proceedings; but the Court or judge, if the whole costs of the action are not intended to be given to the party, may, wherever practicable, by the order direct taxation of the whole costs and payment only of a proportion. It might well, my Lords, have been better to have adhered to the simple principle of placing the whole of the costs in the discretion of the judge or Court, and to have left to them the duty of disposing of the whole of them by definite directions to be inserted in the judgment. But that course has not been taken, and we have to interpret the application of the order as we find it. Now it is plain that, as the language stands, the bare result stated in the judgment is not to be taken as conclusive. If an issue is disposed of separately and has an "event" in some judgment in the action, the costs will automatically follow that "event," unless the judge for good cause provides by his order otherwise.

My Lords, in the appeal before us the action was for 169*l.* 14*s.* 2*d.*, the price of hair sold and delivered in bags. The claim embraced only a single cause of action for breach of contract by non-payment. The defendants could, however, have counterclaimed for a different and distinct breach of contract by asking for damages for inferiority in the quality of the goods delivered to the quality of the goods contracted for, and could have so raised an independent issue and claim. Instead of this they did what I think had substantially the same effect. They paid the price into Court subject to a deduction which they alleged in their defence to represent the amount by which they were in this fashion damnified. On the question thus raised and the amount involved in it the jury found in their favour. For the hair they had paid in enough to satisfy the true claim. But then for the bags they also paid in a smaller amount than that claimed, and on this they were found to have paid too little. In the result judgment was entered against them for the relatively small balance arising merely by the success of the plaintiff on his issue as to the bags, and it was ordered that the plaintiff recover 2*l.* 11*s.* and the costs to be taxed. Was the issue as to the goods themselves an issue which had a separate "event" within the meaning of r. 1 read in

H. L. (E.) 1918

REID, HEWITT AND COMPANY v. JOSEPH.

Viscount Haldane.

its context with r. 2 of Order LXV. ? On the whole, and with some reluctance to interfere with a decision of the Courts below about costs, I have come to the conclusion that it was. The payment into Court disposed of the claim as regards the goods, and decided in the defendants' favour a question as to the sum payable that was quite distinct from that raised as to the bags which contained these goods. The judgment being silent on this point, I think that r. 1 gives the defendants automatically the costs of the issue as to the goods. The word "issue" is ambiguous, but, as Bowen L.J. pointed out in delivering the judgment of the Court of Appeal in *Forster* v. *Farquhar* (1), may well cover a matter in controversy which ought to be treated under a separate head, involving a different class of evidence. That may not be in itself enough to bring the issue within the rule. I feel the force of what was said on the subject in *Howell* v. *Dering*. (2) There the plaintiff had brought an action against (among other defendants) a firm of stockbrokers to recover damages for having been induced by alleged false representations in a prospectus to take shares in a company. It was held that the representations were false, but that the stockbrokers had not authorized the issue of the prospectus. Judgment was given for them with costs, but, the judge having made no order as to the costs of the issue as to misrepresentation, an order was drawn up giving the plaintiff his costs under the rule of the issue as to misrepresentation as against the stockbrokers. They appealed, contending that they should pay no costs of this issue. The Court of Appeal held that the plaintiff was not entitled to any such costs. The ground was that the question of fact as to this representation which the jury had answered affirmatively by itself led to no relief, and so had no event under the rule, and that there was no separate issue resulting in an event within the meaning of the rule. It was true that the plaintiff had succeeded in advancing a step towards success when he established that there had been this representation, but this step formed a mere link in an imperfect chain, and it was not a step which brought, or could in itself bring, him to any point which was decisive of his claim against the stockbrokers and could so constitute what was signified by the word "event."

My Lords, in the case before us the state of matters is different.

(1) [1893] 1 Q. B. 564, 570. (2) [1915] 1 K. B. 54.

The verdict of the jury on the defendants' allegation as to the quality of the goods not only was in their favour, but had as its direct event a substantial result in extinguishing the main head of the plaintiff's claim. This, I think, distinguishes the case from *Howell* v. *Dering*. (1) The distinction seems to me also to explain the decision in *Ingram & Royle* v. *Services Maritimes du Tréport*. (2) But *Slatford* v. *Erlebach* (3) is more difficult to place in line. There a builder had sued for the balance of the contract price for building a house. The defendant had pleaded that the building was not in accordance with the contract, and also the Statute of Limitations. The official referee to whom the action was referred for trial found that the plaintiff would have been entitled to recover a certain amount, but that the Statute of Limitations was a bar to his claim. Judgment was entered for the defendant with costs, except so far as the same might have been increased by the defences other than that of the statute. Although the plaintiff had recovered nothing he claimed the costs of the issues on which he had succeeded. The Court of Appeal (Vaughan Williams and Buckley L.JJ.) held that he had succeeded on an issue resulting in an event within the meaning of r. 1, and gave him the costs, although he had recovered, and could recover, nothing. I am not sure whether the decision was right, or whether, as suggested in *Ingram & Royle* v. *Services Maritimes du Tréport* (2), it was capable of explanation as a mere case of considering how a judgment which the Court of Appeal had power to rectify ought to have been drawn up. But it is not an authority in a case where the finding had an " event " in a very different and real and substantial sense. It is on the material extent to which by the verdict and judgment the plaintiff's claim was successfully met and cut down that I lay stress in the present case. I think that there has been an event following on the trial of an issue distinctly and separately raised by the defence. This seems to me to be consistent with authorities such as *Bush* v. *Rogers*. (4) *Wagstaffe* v. *Bentley* (5) and *Hubback* v. *British North Borneo Co.* (6) were not cases on the mere construction of the rule in question. The first appears to have been simply a question of what was meant

(1) [1915] 1 K. B. 54.
(2) [1914] 3 K. B. 28.
(3) [1912] 3 K. B. 155.
(4) [1915] 1 K. B. 707.
(5) [1902] 1 K. B. 124.
(6) [1904] 2 K. B. 473.

H. L. (E.) 1918

REID, HEWITT AND COMPANY v. JOSEPH.

Viscount Haldane.

by the language of a particular judgment, and the second was one in which the question was what order ought to be made on the merits as to costs of issues where the Court was exercising full discretion.

My Lords, on this appeal all we are concerned with are the bare questions of the construction of the rule and its application to the facts of a particular case. For the reasons I have indicated I have arrived at the conclusion that an issue which has a direct and definite event in defeating the claim to judgment in whole or in part is within the meaning of the rule, and that in the case under consideration such an issue was raised by the pleadings and decided.

LORD DUNEDIN. (1) My Lords, on a question of practice depending on the rules laid down by the English Court for its own guidance I should be slow indeed to differ from any opinion of your Lordships; and I almost feel it a piece of supererogation on my part to say that I entirely concur in the conclusion at which your Lordships have arrived. Your Lordships have minutely reviewed the various rules and decisions, and I shall content myself with stating how the question strikes me in the most concise form.

It is settled by decision, and conceded by the respondent, that "event" in the rule may have to be construed distributively as between separate issues. It is further conceded that if there are separate causes of action, though all embraced in one plaint, the event would be so construed. That, to my mind, reduces the whole question to this simple proposition: Is it or is it not possible to raise separate issues by matter of defence, just as it is possible to raise separate issues by matter of plaint? It seems that it is, and that this was done in the present case.

My Lords, it may not be amiss to state what would have happened in Scotland in a parallel case—not because the Scottish law can have anything to do with the interpretation of an English rule, but because, as the English rule is manifestly intended to be an expression of what is just, it is well to see what would be the result where the matter depends on the wording of no rule, but is determined in accordance

(1) Read by Lord Parmoor.

with settled practice which is also intended to bring about a just result. In Scotland the successful party is entitled to get expenses of process. Now what is success? In cases where the amount sued for is necessarily a matter of estimate, e.g., damages for delict or quasi-delict—tort as it would be phrased here—then any verdict is success, and expenses follow the result, subject only to some special rules as to the recovery of very small amounts, which I need not specify. But when the claim is one of debt the success is not to be judged by the mere fact that a decree for some amount has been secured; there must also be consideration of what sum was asked, and what issues of fact or law were raised affecting that amount. There may be a case of total or divided success. Even where the success is total and expenses are awarded in general terms, there is a rule of taxation under which the successful party does not recover from the unsuccessful the expenses of a separate branch of the case in which he has been unsuccessful; though this is limited to matters involving inquiry, and does not apply to mere arguments of counsel. When there is divided success, i.e., when the defender has been completely successful on an issue and thereby reduced the amount sued for, the logical result would be a cross-finding for expenses. But in practice this is not done, but instead the expenses awarded to the pursuer are what is termed modified, that is, reduced by an arbitrary fraction.

In the present case, had it been tried in Scotland, inasmuch as the pursuer was forced to bring his action in order to recover the 2*l.* 11*s.*, he would have been awarded expenses. But as the chief expense was caused by the presence of witnesses as to the disconformity to contract, as to which the defender succeeded, there would have been a somewhat drastic modification—probably to a third. That is to say that the pursuer would only have recovered one-third of his taxed expenses. It seems to me that the spirit of these rules of practice is exactly in harmony with the result at which your Lordships have arrived, but would be contrary to the result arrived at by the Courts below.

LORD PARMOOR. My Lords, I had prepared a written opinion expressing agreement with the decision of the Court of Appeal and with the reasoning in the judgment of Scrutton L.J. My Lords, I

H. L (E.) 1918 — REID, HEWITT AND COMPANY v. JOSEPH.

do not think it necessary to read my written opinion. I do not dissent from the opinion expressed by the noble Lord on the woolsack.

Order of the Court of Appeal discharged and judgment of Bailhache J. varied by adding thereto a direction that the defendants do have the costs of the issue as to the quality of the goods. The respondent to pay the costs in the Court of Appeal and the costs of the appeal to this House.

Lords' Journals, July 5, 1918.

Solicitors for appellants: *Jaques & Co., for T. K. Greenwood & Mackrell, Bradford.*

Solicitors for respondent: *Herbert Oppenheimer & Nathan.*

[HOUSE OF LORDS.]

H. L (E.)* 1918 — *July* 15.

CLAWLEY . . . . . APPELLANT;

AND

CARLTON MAIN COLLIERY COMPANY, LIMITED . . . . . RESPONDENTS.

Workman's Compensation—Redemption of Weekly Payment—Agreement containing other Benefits for Workman—Weekly Payment not representing full Compensation—Employer's Right to redeem—Partial Redemption—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 17.

The redemption of the weekly payment under par. 17 of Sched. I. of the Workmen's Compensation Act, 1906, must be a final and complete settlement of the whole liability of the employer.

The employer is not entitled under this paragraph to redeem a weekly payment which does not represent the full compensation payable under the Act.

In 1910 a workman employed at a colliery at a weekly wage of 1*l.* 16*s.* 4*d.* met with an accident which resulted in lameness, and his employers paid him half-wages on the footing of total incapacity until 1913. The workman having then partially recovered, an

---

* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD SUMNER, and LORD WRENBURY.

agreement was made between him and his employers whereby the employers agreed (1.) to find him a house, for which he was to pay rent, near the colliery; (2.) to find him suitable light work at which he could sit down; (3.) to pay him wages at a rate which would enable him to earn 1*l.* 7*s.* 6*d.* a week, and 8*s.* 10*d.* a week compensation. The workman worked under this agreement till 1916, when the employers applied to the county court judge to redeem the weekly payment of 8*s.* 10*d.* :—

Held, that the payment was incapable of redemption otherwise than by agreement.

Per Lord Wrenbury: *Semble*, the employers might apply to the county court judge either to have the weekly payment reviewed or to have the statutory weekly payment fixed on the footing of there being no agreement, inasmuch as the agreement was incapable of being enforced by either party, and in that case there might be no difficulty in making an order for redemption.

Decision of the Court of Appeal [1917] 2 K. B. 691 reversed.

APPEAL from a decision of the Court of Appeal (1) setting aside an award of the county court judge of Yorkshire under the Workmen's Compensation Act, 1906, with reference to the employer's right of redemption under par. 17 of the First Schedule to the Act.

The facts are fully stated in the report of the case before the Court of Appeal and in the judgment of the Lord Chancellor, and are summarized in the head-note.

The county court judge found that the incapacity was permanent, at least to the extent of the weekly payment of 8*s.* 10*d.*, and awarded that it should be redeemed at an agreed rate of 221*l.* 6*s.*, but without prejudice (1.) to the continued validity of the other terms of the agreement referred to in the head-note, and (2.) to any liability of the employers to pay further compensation if at any time it should be found that the incapacity had increased.

The Court of Appeal held that the redemption was intended to be a final settlement of all liability on the part of the employers, and the majority (Lord Cozens-Hardy M.R. and Warrington L.J.) held that this weekly payment was capable of redemption, as par. 17 was not confined to cases in which the redemption represented the full measure of compensation to which the workman was entitled. Bankes L.J. differed, and held that the sum was not capable of redemption under par. 17, as it did not represent the full measure of the workman's compensation. The award was set aside, and the

(1) [1917] 2 K. B. 691.

H. L. (E.) 1918

CLAWLEY v. CARLTON MAIN COLLIERY COMPANY.

case remitted to the county court judge with a view to giving the workman an opportunity of applying to review the weekly payment under par. 16.

1918. June 25; July 1, 2. *Douglas Hogg K.C.* and *Shakespeare* for the appellant. First, the county court judge was right. Par. 17 of Sched. I. is open to the construction that the right of the employer to redeem is limited to the weekly payment which is the subject of the application, leaving the workman's other rights under the Act unaffected. This construction avoids the necessity of placing upon the word "permanent," in the provision which fixes the rate of payment "where the incapacity is permanent," the forced interpretation adopted by the Court of Appeal in *Calico Printers' Association* v. *Higham.* (1) "Permanent" in this connection does not mean stable, in the sense that the man must get neither better nor worse, as the Court of Appeal held, but refers to a permanent minimum of incapacity, as was held by the county court judge.

Secondly, Bankes L.J. was right. Par. 17 has no application to cases in which the weekly payment is not the measure of the compensation. The paragraph cannot mean that where a workman has several rights all of them are to be destroyed by the redemption of the weekly payment, which is only one of them. In considering whether the majority of the Court of Appeal are right account must be taken of the obvious injustice which would result from their decision, and which did in fact result in the case of *Marshall, Sons & Co* v. *Prince* (2), which, it is submitted, was wrongly decided. In par. 17 the Legislature contemplated that the weekly payment would be the measure of the man's incapacity for work, and unless the county court judge has before him some evidence which will enable him to come to a conclusion as to the man's present value in the labour market he cannot make an order for redemption. The whole purport of the Act is to compensate for the loss of the workman's earning power in the open market: *Ball* v. *William Hunt & Sons.* (3) The re-employment of an injured workman by his former employer at a certain wage affords no evidence that that wage represents his wage-earning capacity outside his present employment,

(1) [1912] 1 K. B. 93. (2) [1914] 3 K. B. 1047.
(3) [1912] A. C. 496.

for the employer, in finding the workman light work at that wage, may have been actuated by motives of compassion. This small weekly payment of 8*s.* 10*d.* is therefore not capable of redemption otherwise than by agreement.

Bairstow K.C. and *Alexander Neilson* for the respondents. The Act regards compensation being made by a weekly payment only, and under par. 1 the way to end an award or agreement is to end the weekly payment : *Taylor* v. *London & North Western Ry. Co.* (1) Any weekly payment may be redeemed subject only to the workman's right to review. If the weekly payment does not represent the whole amount of the benefits to which the workman is entitled he may always apply to have the same increased by review : *Moreland & Sons* v. *Eley* (2) ; and if he does not do so it is his own neglect. Redemption is intended to get rid of the employer's liability altogether, whether it be fair or not, unless the workman chooses to invoke those provisions of the Act which are inserted for his protection. But in this case no injustice has arisen. The 8*s.* 10*d.* plus the wages which the man was capable of earning when he resumed work come together to the amount of the wages he was earning before the accident. Therefore the inference is that the other benefits of the agreement were incapable of a money valuation. The incidents of an unrecorded agreement (which this is) are the same as the incidents of a recorded agreement with the single exception of enforceability, and, whatever those incidents are, they are subject to review, provided only there has been a change of circumstances. The employer's right to redeem is absolute if he brings himself within the section ; there is no question of discretion : *Kendall & Gent* v. *Pennington.* (3) But if the weekly payment is increased by review at the instance of the workman it may be that the right to redeem is postponed for six months. A redemption which is partial is not a redemption at all ; therefore the county court judge had no jurisdiction to declare that the redemption was without prejudice to the other rights of the workman or to make any declaration of liability : *Castle Spinning Co.* v. *Atkinson.* (4)

Shakespeare replied.

(1) [1912] A. C. 242.
(2) [1916] 1 K. B. 85.
(3) (1912) 106 L. T. 817 ; 5 B. W. C. C. 335.
(4) [1905] 1 K. B. 336.

H. L. (E.) 1918

CLAWLEY v. CARLTON MAIN COLLIERY COMPANY.

[*Nicholson* v. *Piper* (1), *Rex* v. *Templer, Ex parte Howarth* (2), and *Hay's Wharf* v. *Brown* (3), were also referred to.]

The House took time for consideration.

July 15. LORD FINLAY L.C. My Lords, the question in this case is whether, under clause 17 of the First Schedule to the Workmen's Compensation Act, 1906, the employer is entitled to redeem by payment of a lump sum a weekly payment which has been made for six months to the injured workman in a case where the weekly payment does not represent the full compensation due under the Act.

The appellant is a collier, who in the employment of the respondents on August 13, 1910, had an accident which resulted in lameness. His wages had been 1*l.* 16*s.* 4*d.* a week. For three years the respondents paid him half-wages (18*s.* 2*d.* a week) on the basis of total incapacity. He partially recovered, and they ceased to make these payments in July, 1913. The appellant thereupon made application in the county court for compensation under the Act, claiming 18*s.* 2*d.* a week. After some correspondence a settlement was arrived at by letters of October 3 and 4, 1913, on the following terms :—(1.) That the company should find Clawley a house to live in near the colliery ; (2.) that they should find him work in the screens at which he could sit down ; (3.) that they should pay him wages at which he could earn 1*l.* 7*s.* 6*d.* a week, and that they would pay him in addition 8*s.* 10*d.* per week compensation.

Clawley accepted work and continued to work on these terms till November, 1916, except that he did not occupy the house offered under the first term of the agreement. On November 21, 1916, the colliery company applied under clause 17 of the First Schedule to redeem the weekly payment of 8*s.* 10*d.* Clawley denied their right to redeem unless by agreement. The county court judge found that the incapacity was permanent " to the extent at least of the weekly payment of 8*s.* 10*d.*" and awarded that it should be redeemed at the fixed rate, which was agreed at 221*l.* 6*s.*, but added a declaration that the redemption was without prejudice to the continued validity of

(1) [1907] A. C. 215.
(2) [1912] 1 K. B. 351 ; [1912] 2 K. B. 444.
(3) (1909) 3 B.W. C. C. 84.

the other terms of the agreement of October, 1913, and also without prejudice to any further liability of the colliery company to pay further compensation if at any time it should be found that the incapacity had increased. The colliery company appealed against the declaration that the redemption was without prejudice to the other terms of the agreement and the further liability, and the workman entered a cross-appeal against the award of redemption on the ground that it was not a weekly payment which was redeemable.

The Court of Appeal were divided in opinion. They all agreed that the declaration as to the continuance in force of the other terms of the agreement and as to possible further liability was wrong and must be set aside, but they differed on the question whether the weekly payment was capable of being redeemed under par. 17. Bankes L.J. held that it was not capable of being redeemed, as in his opinion the term " weekly payment " in par. 17 should be confined to cases where the weekly payment represents the full measure of the compensation to which the workman is entitled. Lord Cozens-Hardy M.R. and Warrington L.J. held that the weekly payment in question was capable of redemption as the language of par. 17 was general and, in their opinion, not confined to cases in which the payment represented the whole amount of liability. The order of the Court of Appeal was that the appeal of the colliery company should be allowed, that the award be wholly set aside, and that (subject to the workman being afforded an opportunity, if he so desired, of applying to review the weekly payment under clause 16 of the First Schedule) the proceedings to redeem should be remitted to the county court judge to determine whether the capacity of the workman was or was not permanent within the meaning of the word in clause 17 of the First Schedule, and to make an award, accordingly, final and complete. There were further directions as to costs.

In my opinion Bankes L.J. was right in the construction which he placed upon clause 17 of the schedule. It is obvious that the redemption under clause 17 was to be a final settlement of all liability on the part of the employer. This it would be if the weekly payment represented the whole compensation to which the workman was entitled under the Act. But where the weekly payment does not represent the whole, but only the balance of liability which remains,

H. L. (E.) 1918

CLAWLEY v. CARLTON MAIN COLLIERY COMPANY.

Lord Finlay L.C.

after taking into account any benefits or advantages which the workman may receive from the employer and which may or may not be continued, a final settlement by redemption of the weekly payment would be grossly unjust to the workman. The true measure of compensation in such a case is the weekly payment plus so much of the benefits and advantages conceded by the employer as will make up the difference between the statutory liability and the agreed weekly payment, and to cancel the whole liability by redemption of a part only would result in the workman's being deprived of a part of the compensation to which he is entitled. This injustice the county court judge tried to correct by preserving intact the other terms of the agreement. It appears to me that this was not competent on an application under s. 17. The county court judge had no power to make such an award. He could not make binding the other terms of the agreement if they were in their nature not enforceable, as is the case here: indeed, the award does not profess to give any efficacy to the other terms which they had not already; it merely says that the redemption is not to prejudice the other parts of the agreement. The benefits or advantages in respect of which the weekly payment was less than it otherwise would have been may not be secured by any agreement at all, and where there is an agreement it may be, as here, of such a nature as not to be readily enforceable at law. The difficulties of working out redemption under clause 17 in any case in which the weekly payment does not represent the whole measure of liability afford a strong reason for the reading of that clause which commended itself to Bankes L.J.

The wording of the clause points strongly to this conclusion. The clause applies only where the weekly payment has been continued for not less than six months. This is quite intelligible, if the weekly payment represents the whole statutory liability. Payment for six months of that amount is regarded as an indication that the amount of the statutory liability may be treated as fixed, so that the final settlement may fairly be arrived at by payment of a lump sum on that basis. The provision as to six months' payment is quite unintelligible if the payment does not measure the liability, but merely represents a balance of liability after taking into account other benefits or advantages which may be in their nature precarious. If the weekly payment measures the statutory liability, the working

of clause 17 is simple and comprehensible. On the view adopted by the majority of the Court of Appeal the difficulties of working it out are insuperable. It is no answer to say that the workman may apply to have the weekly payment increased on the footing that he gives up the other benefits or advantages which he has enjoyed, and that redemption would then be fair. The whole question here is whether the employer is entitled to redeem a weekly payment which does not represent the whole liability. The redemption is to be of a weekly sum which has been actually paid for not less than six months. This renders it impossible to have an award for redemption of the weekly sum plus so much of the other benefits or advantages as makes up the amount of the statutory liability; and yet no redemption on any other basis would be fair.

Cases might conceivably occur in which a portion of the statutory liability of the employer had been obliterated by an executed consideration, it might be by the payment of a lump sum, the conveyance in fee of a cottage, or the purchase of a Government annuity, and there might be a payment of a weekly sum representing the margin of statutory liability which had not been so extinguished. In such a case redemption of the weekly payment would totally extinguish all that was left of the statutory liability. The application of clause 17 even to such a case was, however, contested by the counsel for the appellant, and the facts of the present case are so remote from the case supposed that it is not necessary to decide anything upon it. On the view which I have above expressed as to the meaning of clause 17 it is unnecessary to remit for consideration the question whether the incapacity should be considered as permanent within the meaning of clause 17.

For these reasons, in my opinion the judgment of the Court of Appeal and the award should be set aside and the application to redeem remitted to the county court, as it is possible that an application for revision may be made. The appellant should have his costs of this appeal and also of the proceedings which have taken place in the county court and in the Court of Appeal.

VISCOUNT HALDANE. My Lords, in this case the appellant was injured in 1910 by the accident of a fall of coal. The respondents, his employers, admitted liability, and paid compensation as from

H. L. (E.) 1918

CLAWLEY v. CARLTON MAIN COLLIERY COMPANY.

Viscount Haldane.

August in that year. The average weekly earnings of the appellant before the accident were 1*l.* 16*s.* 4*d.*, and compensation was paid him at the rate of one-half, amounting to 18*s.* 2*d.* a week. In June, 1913, payment of compensation on this footing was discontinued, and the appellant filed a request in the Barnsley County Court to enforce such payment. The appellant had recovered from his injuries sufficiently to be able to do light work, and in the end an agreement was made in October, 1913, between him and the respondents to the following effect.

The respondents were to find for the appellant a house near the colliery, which he was to rent from them; they were to give him work at which he could sit down, and they were to pay him wages by which he could earn 1*l.* 7*s.* 6*d.* a week, and were, in addition, to pay him 8*s.* 10*d.* a week. These two sums were equivalent to his weekly wages before the accident.

My Lords, the question before us arises on an application made in November, 1916, by the respondents to redeem the weekly payment of 8*s.* 10*d.* under the provisions of the Workmen's Compensation Act, 1906, Sched. I., clause 17. That clause of the schedule provides that where any weekly payment has been continued (as was here the case) for not less than six months, "the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to seventy-five per cent. of the annual value of the weekly payment, and as in any other case may be settled by arbitration." The learned county court judge, in a very careful and full judgment, found that the incapacity of the appellant was permanent to the extent, at least, of the weekly payment of 8*s.* 10*d.*, in the sense that his earning capacity had been thus diminished permanently to an extent measured at the lowest by 8*s.* 10*d.*, and might thereafter prove to have become diminished still further, so that on review under the provisions of the Act increased compensation might have to be paid, and he made a declaration to that effect. Subject to this he ordered that the respondents should be at liberty to redeem the weekly payment of 8*s.* 10*d.* for 221*l.* 6*s.*, an amount agreed on as

correct, but merely on the footing that there was a right conferred by the Act to redeem that payment standing by itself. He also declared that the redemption was to be without prejudice to the continuing validity of the remaining terms of the agreement, and to any further liability of the respondents to pay larger compensation to the appellant if at any time it should be found that the incapacity of the appellant had been diminished below the average weekly earning capacity of 1*l.* 7*s.* 6*d.* in consequence of the injury.

The respondents appealed to the Court of Appeal, and that Court reversed this judgment, and held that, subject to the appellant being afforded an opportunity of applying to review the weekly payment, the proceedings should be remitted to the county court to determine whether the incapacity of the appellant was or was not permanent within the meaning of clause 17 of the schedule, and to make a complete award accordingly. They held that the finding must be set aside, because the county court judge had not found that the incapacity was permanent, and also because, as an award under clause 17 must be final and conclusive, he had no jurisdiction to insert in it a declaration as to future liability. They further held by a majority (Lord Cozens-Hardy M.R. and Warrington L.J.) that the 8*s.* 10*d.* was a weekly payment within clause 17, notwithstanding that it formed part only of the entire compensation to which the appellant was entitled, and that it was therefore redeemable. Bankes L.J. dissented, thinking that the case was one in which no order for redemption could be made, inasmuch as an order for redemption, once made, was final and extinguished every claim, and that the weekly payment under consideration was not one which was of the nature contemplated by clause 17. This point was directly raised on a cross-appeal by the appellant.

My Lords, in order to come to a conclusion as to which of these views was the true one it is necessary to look at the Act as a whole. Sect. 1 enacts that if the workman suffers, as here, personal injury by accident in his employment he is to be entitled to compensation in accordance with the First Schedule. That schedule provides, clause 1 (*b*), that, where total or partial incapacity results from the injury, a weekly payment during the incapacity not exceeding 50 per cent. of the workman's average earnings is to be the compensation, but that the weekly payment is not to exceed one pound. Clause 3

H. L. (E.) 1918

CLAWLEY v. CARLTON MAIN COLLIERY COMPANY.

Viscount Haldane.

provides that in fixing the amount of the weekly payment regard is to be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of the incapacity, and that in the case of partial incapacity the weekly payment is not to exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper. By clause 16 of the schedule any weekly payment may be reviewed at the request either of the employer or the workman, and the amount, in default of agreement, shall be settled by arbitration. Clause 17 I have already quoted as providing, where any weekly payment has been continued for six months, for redemption.

My Lords, after considering the statute as a whole, I have come to the conclusion that Bankes L.J. was right in holding that the weekly payment of 8*s.* 10*d.* was not such a payment as was redeemable under the provisions of clause 17 of the schedule. It will be observed that what is to be redeemed is "the liability for such a payment." Now, although the language used is far from clear, I do not think that it ought to be held as importing that the whole of the liability of the respondents is to be extinguished by redemption of what is merely part of it, or that clause 17 should apply where the provisions of clause 3 have operated, under which the amount of the weekly payment has been diminished to allow for other benefits received. The Act, read as a whole, plainly signifies that the workman is to have the full compensation contemplated by the initial part of the schedule. No doubt it assumes that a weekly payment may form an element in this compensation. But clause 3 plainly indicates that it is not necessarily to exhaust it. Other benefits received from the employer may be taken into account if received in diminishing it at least temporarily, and the payment is always made subject to review under clause 16. Can it have been intended to enable the employer to get rid of his liability for any addition to the weekly payment to which the workman may be entitled under clause 3, and which has been omitted merely because its place is for the time taken by the other benefits? I am

of opinion that so to hold is to deprive the workman of what is clearly his right under the Act, and that it should not be so held if any other construction be possible. Reading the statute as a whole, I think that the expression in clause 17 "liability therefor" must mean a liability to the actual amount paid weekly only in cases where the amount of the weekly payment covers the liability. I do not think it was intended to extinguish, by payment of a sum that may be quite inadequate, the liability for the residue of the compensation which the earlier words confer by a clear title.

I find myself compelled, by the intention to be collected from the Workmen's Compensation Act read as a whole, to interpret the words in clause 17, giving power to extinguish liability for a weekly payment which has continued for six months, as confined to the case where the weekly payment is the full equivalent of the total compensation. On this point I agree with what was said in the Court of Appeal by Bankes L.J.

I am therefore of opinion that we ought to discharge the orders of the county court judge and of the Court of Appeal and to remit the case to the county court judge to be dealt with, if it be desired, on the footing that redemption is inadmissible unless a weekly payment representing the entire compensation to which the workman is entitled has been adjusted. I refrain from expressing any opinion on a point which has not yet arisen and has not been argued, whether, before redemption is treated as admissible, the whole of such a full weekly payment must have been paid for six months.

LORD SUMNER. My Lords, I concur. Since I wrote an opinion, which some of your Lordships may have read, I have had the advantage of reading and considering the opinion which is about to be read by my noble and learned friend Lord Wrenbury, and, as I entirely agree with it, I will not detain your Lordships by any remarks of my own.

LORD WRENBURY. My Lords, the workman having suffered personal injury by accident, so as to give rise to a claim for compensation under the Act, made on September 15, 1913, a claim for compensation accordingly. After negotiations the employers and the workman in October, 1913, agreed terms which, shortly, were

H. L. (E.) 1918

CLAWLEY v. CARLTON MAIN COLLIERY COMPANY.

Lord Wrenbury.

(1.) that the employers should find the workman a convenient house ; (2.) that they should find him certain employment at which he could earn 27*s.* 6*d.* a week ; and (3.) that they should " pay him in addition 8*s.* 10*d.* per week compensation." The 27*s.* 6*d.* and 8*s.* 10*d.* together made up his full previous wage of 36*s.* 4*d.* On November 21, 1916, the employers applied to the Court " with respect to the redemption of the weekly payment payable to the said Joseph Clawley under the said Act in respect of personal injury," &c. I note in particular the words "payable to the said Joseph Clawley *under the said Act.*" They asked to redeem that for which the Act rendered them liable, whatever that was. The question is whether any order can be made for redemption, and if so, what form of order is possible.

The county court judge made an order redeeming the 8*s.* 10*d.* and adding a declaration that the redemption was without prejudice to the continuing validity of the remaining terms of the agreement. In other words, he redeemed part and preserved the rest of the benefits which the agreement reserved to the workman. The Court of Appeal set aside that decision and remitted the matter to the county court judge in terms which it is for the moment unnecessary to state. The workman appeals.

The question turns upon the provisions of certain clauses in the Act, and in particular of clauses 16 and 17 of the First Schedule. Of these clause 17 is chief.

The first question I propose to consider is whether clause 17 applies at all to this agreement as it stands.

The frame of the Act is that (s. 1, sub-s. 1) the employer is liable to pay compensation in accordance with the First Schedule, and (s. 1, sub-s. 3) if any question arises in any proceedings under the Act as to the liability to pay compensation the question, if not settled by agreement, shall, subject to the provisions of the First Schedule, be settled by arbitration in accordance with the Second Schedule. The question, therefore, may be—and in this case it was —settled by agreement.

If the matter had not been settled by agreement the compensation would, under sched. I., clause 1 (*b*), have taken the form of a weekly payment. That weekly payment would have had three characteristics : first, it could not exceed 50 per cent. of the average

weekly earnings (Sched. I., clause 1 (*b*)) (in the present case that would be 18*s.* 2*d.*) ; secondly, in fixing its amount regard would be had to any payment, allowance, or benefit which the workman might receive from the employer (Sched. I., clause 3) ; and, thirdly, it would be, not fixed, but capable of alteration, according to altered circumstances. It could be reviewed and on review might be ended, diminished, or increased (Sched. I., clause 16). Mr. Shakespeare has argued, and I see no reason to dissent from the argument, that the words " weekly payment " in clause 17 have exactly the same meaning as if the word " compensation " were substituted for them. That clause authorizes redemption of " the liability therefor," that is to say, redemption of the liability for the weekly payment (the compensation), with all the three characteristics above stated. The redemption under clause 17 must, I think, be a redemption of all or nothing. If it is impossible to redeem all, there can be no redemption at all.

If the compensation is fixed, not by proceedings under the Act, but by agreement (which the Act allows), and the agreement is that a certain weekly payment shall be made and nothing more, there is no more difficulty in a redemption under clause 17 in that case than if the amount had been fixed by arbitration. But that is not here the case. The agreement is that the workman shall have (1.) the right to a house, (2.) employment at 27*s.* 6*d.* a week, and (3.) a weekly payment of 8*s.* 10*d.* The two former are not capable of redemption, although, of course, they could be terminated, as they were created, by agreement. The 8*s.* 10*d.* is capable of redemption, but there are two objections to that, namely, first, that redemption of that benefit without redemption of the rest is not within the Act, if I am right in thinking that redemption must be of all or nothing ; and, secondly, that the 8*s.* 10*d.* is not, either by agreement or by arbitration, the statutory weekly payment by way of compensation. It is a contingent contractual sum to which the parties have agreed as being satisfactory to both so long as certain other benefits are enjoyed. It does not follow that the man's working capacity is reduced to 27*s.* 6*d.* a week, or that the parties have agreed that it is so reduced because the employer has agreed to find him work at that wage. It may be that it is reduced to 20*s.* a week, and that the weekly payment by way of compensation would be 16*s.* 4*d.* Further,

H. L. (E.) 1918

CLAWLEY v. CARLTON MAIN COLLIERY COMPANY.

Lord Wrenbury.

the benefits which the workman enjoys under the agreement are not (when translated into money, if they can be so translated) the amount required to make good to him his loss of earning power. They amount in the aggregate to the pecuniary equivalent of his whole earning power as if he had lost none. To redeem upon the footing of those benefits would be to redeem upon the footing of 100 per cent., not of 50 per cent., of his previous wages. In my judgment, clause 17 does not apply at all to the redemption of this agreement as it stands.

But it does not follow that the employer is excluded from the statutory benefit of redemption from his statutory liability. I have already pointed out that the weekly payment by way of compensation is not a fixed thing, but a thing variable according to altered circumstances. And the concluding words of s. 3 of the Act prevent contracting out of the Act. Subject to a saving which is not applicable here, "this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act." The existence of the agreement, therefore, is no impediment to a resort to the provisions of the Act to ascertain what is the statutory weekly payment, and to an application for redemption of all liability therefor. This may, I think, take the form either of an application for review under Sched. I., clause 16, or of an application to fix the statutory weekly payment on the footing that there is no such agreement as that of October, 1913. The agreement is one which is obviously incapable of being enforced according to its terms by either party. If the employers are minded to discontinue it and to ask for a decision upon their statutory liability they are at liberty to do so. When the statutory weekly payment has been ascertained there may be no difficulty in making an order for redemption.

From the foregoing it follows that the order of the county court judge was, in my opinion, erroneous, for he redeemed part and preserved the rest. The Court of Appeal set aside that order, and, while indicating that it was open to the workman (not the employer) to apply to review under clause 16, remitted the matter to the county court judge to determine whether the capacity of the workman was "permanent" and "to make an order accordingly final and complete." Their order, therefore, proceeds upon the footing that, although the workman might apply under clause 16 to review, it

was competent to the judge to redeem the agreement as it stands. For the reason I have given, I think this also is erroneous.

My Lords, in my judgment both orders below should be discharged, and the matter remitted to the county court judge without more. If the employer proceeds with the application as it stands and without making any application to review or to fix the statutory compensation, the judge will no doubt deal with it accordingly. If either employer or workman makes some application such as above, a different result may ensue. It will be for the county court judge to decide what the statutory compensation is, and whether, in the language of clause 17, "any weekly payment has been continued for not less than six months." Neither question arises upon this appeal. As to the latter, I expressly reserve my opinion upon it, and guard myself by saying that I must not be taken to assent to the Lord Chancellor's expression of opinion that "the redemption is to be of a weekly sum which has been actually paid for not less than six months."

The proceedings up to the present time seem to me to have been misconceived. I agree with the order proposed by the Lord Chancellor, including the order as to costs.

I have purposely abstained from saying anything as to the meaning of "permanent." The question does not at present arise for decision.

Order of the Court of Appeal and award of the county court judge thereby set aside discharged. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House. Cause remitted back to the county court to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 15, 1918.

Solicitors for appellant: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

Solicitors for respondents: *Barlow, Barlow & Lyde, for Wilmshurst & Stones, Huddersfield.*

[HOUSE OF LORDS.]

H. L. (E.)* 1918 *June* 17.

PRICE . . . . . APPELLANT;

AND

GUEST, KEEN AND NETTLEFOLDS, LIMITED . . . . . RESPONDENTS.

Workmen's Compensation — Assessment — Continuity of Employment — Strike—One Week's Cessation of Work — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 1 (*a*) (*i.*).

A workman, who was killed in March, 1916, by an accident arising out of and in the course of his employment, had been employed at a colliery in the same grade for many years and worked upon the terms of a Conciliation Board agreement of April, 1910, until its termination on June 30, 1915, from which date he and his fellow workmen worked from day to day, pending negotiations for a new agreement, till July 15, when they ceased work. They remained out of work till July 22, when they resumed work upon the terms of a provisional agreement, which was ultimately superseded by a new Conciliation Board agreement dating back to July 15. Upon a claim for compensation by the widow under the Workmen's Compensation Act, 1906, the sole question in dispute was whether the compensation should be assessed under Sched. I., par. 1 (*a*) (i.), upon the basis of the earnings of the deceased for the three years next preceding the accident or of his average weekly earnings between July 23 and the date of his death. The county court judge found that during the week of the strike the relation of master and servant did not exist and that there had been a break in the continuity of the employment. He therefore held that the period for computing the compensation began on July 22 :—

Held (by Lord Atkinson and Lord Wrenbury; Lord Finlay L.C. dissenting), that there was no evidence to support the finding of the county court judge, and that the compensation should be assessed on the basis of the man's actual earnings during the three years next preceding the accident.

Decision of the Court of Appeal [1917] 1 K. B. 780 affirmed.

APPEAL from a decision of the Court of Appeal varying an award of the county court judge of Glamorganshire under the Workmen's Compensation Act, 1906. (1)

* *Present:* LORD FINLAY L.C., LORD ATKINSON, and LORD WRENBURY. LORD PARKER OF WADDINGTON was present at the opening, but retired through illness.

(1) [1917] 1 K. B. 780.

The appellant, the widow of David Price, claimed compensation from the respondents for the death of her husband.

The respondents admitted liability, and the sole question in dispute between the parties was as to the basis on which the compensation should be assessed under Sched. I., par. 1 (*a*) (i.). The facts are fully stated in the report of the case before the Court of Appeal and in the judgment of the Lord Chancellor and are summarized in the head-note.

The respondents contended that the compensation ought to be assessed on the footing that the deceased had been continuously in their employment during the three years next preceding the injury, and they paid into Court the sum of 259*l.* 4*s.*, being the total amount of the man's earnings during that period.

The appellant contended that the continuity of the deceased's employment had been broken by his cessation from work from July 15 to 22, and that the compensation ought to be assessed on the average weekly earnings of the deceased between July 22, 1915, and March 10, 1916, the date of his death, and it was admitted that on that basis she was entitled to an award for 300*l.*

The county court judge found that during the seven days the men were on strike there was no engagement at all and that the relation of master and servant did not exist, and that on the man's return to work there was a new contract of service. He therefore held that the period to be taken into consideration, in calculating the amount of compensation, began from July 22, the date of the second engagement, and made an award for 300*l.* The Court of Appeal (Lord Cozens-Hardy M.R., Warrington L.J., and A. T. Lawrence J.) held that the abstention from work during the week of the strike did not constitute a break in the employment, and that the compensation must be calculated on the basis of the man's actual earnings during the three years next preceding the accident.

March 22, 25, 26. *Tindal Atkinson K.C.* and *Llewelyn Williams K.C.* (with them *Villiers Meager* and *Van den Berg*) for the appellant. The question as to the method on which the compensation payable to the appellant is to be calculated under par. 1 (*a*) (i.) of the First Schedule to the Workmen's Compensation Act, 1906, depends on the question whether the deceased was in the employ-

H. L. (E.) 1918 PRICE v. GUEST, KEEN AND NETTLEFOLDS.

ment of the same employer during the three years next preceding his injury or whether the period of his employment was less than three years. Employment here means continuous employment. The period of employment is to be an absolutely uninterrupted period, whether the interruption be by an avoidable or an unavoidable cause: *Greenwood* v. *Joseph Nall & Co.* (1); *Jones* v. *Ocean Coal Co.* (2); *Hathaway* v. *Argus Printing Co.* (3); *Appleby* v. *Horseley Co.* (4); *Giles* v. *Belford, Smith & Co.* (5) Here the county court judge has found that during the seven days between July 15 and 22, 1915, the relation of master and servant did not subsist and that there was a new contract on the latter date, and there was evidence to support his finding. The Court of Appeal have held—1, that there was no sufficient notice to terminate the engagement, and 2, that a week's cessation was not substantial. As to 1: No specific notice is required to terminate a day to day contract; it is a contract for the day and ipso facto comes to an end at the termination of the day. But assuming that notice is required, the resolution of the delegates of July 12 declaring the strike was in effect notice to the employers; the strike was a matter of notoriety. Moreover, no question of any informality or want of notice was taken before the county court judge, and that point was not open to the employers in the Court of Appeal and is not open to them now. As to 2: The authorities above cited show that the period of employment must be absolutely continuous. Applying the tests laid down by Vaughan Williams L.J. in *Jones* v. *Ocean Coal Co.* (2), Was the man willing to work? Admittedly No. Were the employers willing to offer work? No evidence. Under these circumstances the county court judge had before him material which entitled him to find, as he did, that there was a break in the continuity of the employment.

Compston K.C. and *D. Rowland Thomas* for the respondents. To entitle the appellant to compensation under the second limb of par. 1 (*a*) (i.) it must be shown that the employment was an employment short of a substantially continuous employment for three years. As regards the seven days during which the deceased was out

(1) [1917] A. C. 1.
(2) [1899] 2 Q. B. 124.
(3) [1901] 1 K. B. 96.
(4) [1899] 2 Q. B. 521, 525.
(5) [1903] 1 K. B. 843.

of work, the maxim De minimis applies. Continuity of employment does not involve continuity of the contractual engagement : *Hewlett* v. *Hepburn & Co.* (1) ; *Turner* v. *Port of London Authority.* (2) The employment need not be under one contract of service ; there may be a succession of contracts. The onus is on the applicant, the appellant, to prove that the old contract was at an end and that a new contract came into existence commencing on July 22, and that onus she has failed to discharge. It was for the applicant to show that this day to day contract was a contract which came to an end automatically, like the contract of a dock labourer or a taxicab-driver. Assuming that notice was necessary to terminate this contract, it was agreed in the Court of Appeal, in order to save the expense of sending the case back to the county court judge, that no notice of the so-called strike was given to the employers. The men simply ceased work ; they did not even remove their tools. There being no evidence of what this contract was, or that it was a contract that could be determined without notice, there could be no evidence that the contract had come to an end. A mere repudiation of a contract does not of itself bring the contract to an end : *Frost* v. *Knight.* (3) On July 15, no notice to terminate having been given, the men were still under an obligation to work for their employers ; and it is remarkable, as showing the appellant's view of the case, that in her particulars of claim compensation is claimed as from July 15. There was no evidence whatever to support the finding of the county court judge beyond the mere fact that the deceased was out of work.

Tindal Atkinson K.C. replied.

The House took time for consideration.

June 17. LORD FINLAY L.C. My Lords, the question in this case is as to the measure of compensation payable under the Workmen's Compensation Act, 1906, in respect of the death of a workman. The relevant enactments are found in the First Schedule to the Workmen's Compensation Act, 1906, clause 1 (*a*) and clause 2 (*c*). Clause 1 of that schedule deals with the amount of compensation payable under the Act, and under (*a*) it provides what

(1) (1899) 16 Times L. R. 56. (2) (1913) 6 B. W. C. C. 23.
(3) (1872) L. R. 7 Ex. 111.

H. L. (E.) 1918 PRICE v. GUEST, KEEN AND NETTLEFOLDS. Lord Finlay L.C

the compensation should be where death results from the injury. In cases in which the workman has left dependants wholly dependent upon his earnings the compensation is to be "a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury," or 150*l.*, whichever of these sums is the larger, but in no case to exceed 300*l.*, "and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer."

Clause 2 (*c*) gives the following definition: "Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause."

The deceased was killed by accident in the course of his employment on March 10, 1916, and his widow claimed compensation on the footing that the period of the deceased's employment by the same employer had been less than three years, in which case she would be entitled to the maximum compensation of 300*l.* The employers contended that he had been in their employment during the three years next preceding the injury, so that the compensation was the amount of his earnings during the three years, namely, 259*l.* 4*s.*

The case resolved itself into an inquiry whether there had been a break in the employment from July 14 to 21, 1915. If there had been such a break, the employment would not have been continuous for the three years and the larger amount of compensation would be payable.

The county court judge decided in favour of the claimant, giving her 300*l.* His decision was overruled by the Court of Appeal, who held that there was in point of law no evidence on which the county court judge could find that there had been such a break in the employment, and reduced the amount of compensation to 259*l.* 4*s.* Your Lordships are now asked to restore the award of the county court judge.

The deceased had been in the employment of the respondents as

assistant repairer for three years continuously, unless there was a break during the week July 14 to 21, 1915, as found by the county court judge. Up to June 30, 1915, he was serving on the terms of the Conciliation Board agreement of April 8, 1910, which by clause 26 was to continue until March 31, 1915, and thenceforth until the expiration of three months' notice. On April 1, 1915, the three months' notice was given to terminate this contract, and that notice expired on June 30, 1915. The deceased, however, along with the other men, worked on "day by day" up to July 14. During the week July 14 to 21 there was what is called in the judge's notes a strike, and the deceased, with most of the other men in the colliery, did no work during that time. On July 22 they returned to work on a provisional agreement, and on September 2, 1915, a final agreement was arrived at regulating in a number of particulars the terms of employment. Its 30th clause provided that the agreement should continue in force from July 15 till the expiration of six months after the expiration of the war, and thereafter until the expiry of three months' notice. The 32nd clause provided for the signature of the contract by the owners and by each workman "as one of the terms of the engagement between the owners and the said workmen." This agreement was signed by owners and workmen, including the deceased, the men returned to work, and the deceased continued at work until his death.

The authorities lay down, and I think rightly, that a workman is not in the employment of the same owner for the three years within the meaning of the provisions of the schedule which I have quoted unless his employment is continuous. It need not be under the same contract of service. So long as there is no interval of time between the end of one contract of service and the beginning of another there would be continuous employment. Indeed, I think it follows from the authorities that if a dock labourer, who is engaged day by day, whose wages are paid at the close of each day, and who has no right to be employed on the following day, had been in fact employed on every working day of the three years by the same employer, there would have been continuous service, and therefore he would have been in the employment of the same employer for the three years so as to render applicable to his case the first scale mentioned in clause 1 (*a*) of the First Schedule.

H. L. (E.) 1918 — PRICE v. GUEST, KEEN AND NETTLEFOLDS. — Lord Finlay L.C.

If there is continuous *employment*, it is not necessary that there should be continuous *work*. If the contract or contracts subsist throughout the three years, there may be intervals in the work. The man may be employed to work only for, say, two or three days a week. He may stop away from work with or without leave, and even unlawful absence would not interrupt the continuity of the employment unless the employer dismissed the workman for it.

As the absence of the deceased from work during the week July 14 to 21, 1915, was wilful and not due to illness or any other unavoidable cause, it is unnecessary for the purpose of the present case to consider the meaning of the words at the end of clause 2 (*c*) of the schedule, "interrupted by absence from work due to illness or any other unavoidable cause," which have given rise to so much doubt and difficulty.

That the deceased was not working during the week July 14 to 21, 1915, is clear. The question on which the county court judge and the Court of Appeal differed was whether during that week there was a break in his employment as well as in his work. The question is one purely of fact, and the decision of the county court judge is conclusive on questions of fact, provided there was any evidence in point of law on which his conclusion of fact could be arrived at. The only ground on which the decision of the county court judge can be reversed is that there was no evidence on which, if the case had been tried by a jury, the judge would have been justified in leaving the question to them.

At the conclusion of the hearing I was under the impression that there was evidence on which the county court judge might arrive at the conclusion which he reached. As I understood that the majority of your Lordships on the hearing of this appeal were of opinion that there was none, I have most carefully reconsidered the case, and after doing so I remain of opinion that it is impossible to say that there was in point of law no evidence in support of the appellant's contention. It was, of course, for the appellant, as claimant, to establish the proposition on which her claim to compensation on the scale which happened in the present case to be more beneficial to her must depend. The burden of proof was upon her, and if she failed to adduce any evidence in support of it the Court of Appeal were justified in setting the award aside. The award could

not be interfered with merely on the ground that upon the balance of evidence a different conclusion ought to have been arrived at.

The contract on which the deceased had for a long time worked came to an end on June 30, 1915, but he and the other workmen worked "day by day" up to July 14. Working "day by day," in my opinion, denotes prima facie that there was no engagement of any sort beyond the day. It was not suggested that there was any usage requiring notice to determine such an employment, and indeed, on what I think is the prima facie meaning of the term, there is nothing on which notice could operate. If a man work merely "day by day" he is not bound to return to work on the morrow. We have no information as to whether the wages are, under such a system, paid each day or at the end of the week, and it does not appear to me that in either case such a circumstance can be decisive. No point appears to have been taken in the county court as to the necessity of notice in order to terminate a "day to day" employment, and I think that Mr. Tindal Atkinson was entitled to observe, on behalf of the appellant, that if this point had been raised it might have been met by evidence.

The county court judge found that there was a complete break in the employment from July 14 to 21, and further on in his judgment he explains his meaning thus: "In further reply to the contentions made on behalf of the respondents I say that during the seven days the men were away there was no engagement at all. The relationship of master and servant did not exist; it was open for the deceased and any other workman to enter into any employment they liked without any liability for breach of service and the employers could decline to re-engage them without any corresponding liability. It did not matter what had taken place between the masters and the representatives of the workmen; nothing was binding on this man until he signed the agreement on his return. When he returned to work the contract set forth the terms (which differed materially from the old contract) and the man signed it. From that time there was a new contract. I hold, therefore, that the period to be taken into consideration to be calculated begins from the date of the second engagement; I think the figures in that event have been agreed upon, and the award will be for 300*l*."

H. L. (E.)
1918
PRICE
v.
GUEST, KEEN AND NETTLEFOLDS.
Lord Finlay L.C.

His decision was reversed in the Court of Appeal (1), the Master of the Rolls observing: "We are left in the dark as to the conditions of the 'day to day' working. I think it is fair to assume that some reasonable notice on one side or the other was necessary to terminate the engagement, probably a day's notice. There is no evidence that any such notice was given." Surely, if reasonable notice was necessary, it was for the respondents to give some evidence of this; but there is none, and in my opinion the nature of the engagement "day by day" renders it prima facie improbable that any such notice could be necessary. Warrington L.J. says: "There was no evidence of any stipulation or of any custom dispensing with notice to terminate the contract involved in the 'day to day' working, and the Court in such a case is not entitled to assume that the contract is terminable without the reasonable notice which the general law requires. What would be reasonable notice is not for us to determine. It may be that in the case of 'day to day' contracts notice given on one day of the intention to determine the contract as from that day might be sufficient, but in this case there was no evidence of any notice at all having been given either by Price or by his employers." Work "day by day," unexplained by any evidence as to usage, seems to me to import that there was a fresh engagement every day, and the general law as to reasonable notice cannot be treated as applicable to such a case.

The evidence is extremely meagre. The only witness was Mr. John Davies, the miners' agent for Dowlais district. He said: "David Price was out of work from July 15 to 21 inclusive. He returned to work on a provisional agreement that was made between the coal owners and the representatives of the workmen." This statement appears to me to be consistent with the view that the deceased was out of employment from the 15th to the 21st and resumed it on the provisional agreement. The phrase "out of work" in the ordinary use of words is more naturally used to denote a case in which a man is out of employment than the case of a man whose employment continues although he chooses to abstain from actually working under it. And the phrase "he returned to work on a provisional agreement" is apt to denote resumption of employment. There was no cross-examination of this witness, and

(1) [1917] 1 K. B. 780, 785, 787.

there was no evidence to rebut the inference which might be drawn from the evidence that there was a break in the employment. If the witness had meant merely that the deceased struck work and in fact did not work, he would, I think, have said so. It is very difficult to see how the employers could have maintained any claim against the workman working "day by day" for absenting himself from work after July 14, and on the materials before us I think that any such claim would have failed. It was not contended for the employers that any wages had been either earned or paid for the week July 14 to 21, and on the evidence the natural inference is that they were not. Some reliance was placed by the respondents on the provision in clause 30 of the agreement of September 2, 1915, that the agreement should continue in force from July 15, 1915, until the expiration of six months after the termination of the war, and thereafter until the expiration of three months' notice. But this agreement is really not a contract of service, but a statement of the terms which were to attach to service while it was in force. The deceased was not working during the week under question and the terms could not apply to him in respect of that week.

There were two circumstances on which the respondents relied in argument at the bar of your Lordships' House. The first was that the men left their tools in the mine during the week July 14 to 21, and this, it was urged, showed that they considered their employment had not terminated. All that it shows is that the men thought it very possible or probable that they would resume their employment. Negotiations were, as Mr. Davies proves, going on between the representatives of the owners and those of the men, and the "strike" was no doubt a move in the game in the hope of bringing the masters to terms. The men hoped and believed that terms would be arrived at, and in this hope, in which they were not disappointed, they left their tools in the collieries to be used when their employment should begin anew. Leaving the tools is just as consistent with this view as with the view that the men considered their employment as still subsisting.

The other point relied on by the respondents was that in the particulars of claims under head 6 the claimant put her claim as "over 2*l.* per week from July 15, 1915." This, of course, does not

H. L. (E.) 1918

PRICE v. GUEST, KEEN AND NETTLEFOLDS.

Lord Finlay L.C.

amount to an estoppel. It was a matter fit to be considered by the judge in favour of the respondents' view, but it is not conclusive. Indeed it seems to me to be very far from conclusive and to have really no bearing on the question whether there was any evidence in point of law to support the claimant's contention.

Upon the whole, in my opinion this appeal ought to succeed, and the decision of the county court judge should be restored.

LORD ATKINSON. My Lords, I regret that I am unable to concur with the judgment which has just been delivered by my noble friend on the woolsack.

In this case the claimant's husband met with his death on March 10, 1916, while in the employment of the respondents. The respondents are quite ready and willing to pay to her under the first limb of par. 1 (*a*) (i.) of the rules in the First Schedule to the Act of 1906 a sum equal to the full amount of her husband's earnings during the three years preceding his death. It turns out that she would in this particular instance obtain something more if the amount were measured under the second limb of this rule than measured under the first limb, and accordingly she claims under the former. To entitle her to succeed she must establish satisfactorily that her husband was not in the respondents' employment for the entire of the three years immediately preceding the day of his death. In this case, like every other, the plaintiff, or the person standing in the position of a plaintiff, must prove his or her case, although from the way in which the case was conducted before the county court judge one might not think so. Now how does she propose to do that? She proposes to show that there was a break in his employment from July 14 till July 22, 1915. Her husband was serving his employer under the terms of an agreement dated April 8, 1910, styled the Conciliation Board agreement, which was to continue operative till March 31, 1915, and thenceforward until terminated by a three months' notice. On April 1, 1915, the necessary notice was given to terminate the contract on June 30, 1915, Though the deceased's contract of service thus terminated on June 30, 1915, he did not cease to work on that day. On the contrary he continued to work as theretofore for the respondents up to and inclusive of July 14, 1915, and then ceased to work till July 22, 1915, when he recom-

menced work under what is styled a provisional agreement. Now one would suppose that the necessity of ascertaining the details as to the terms and conditions under which the deceased continued to work from June 30, 1915, till July 14, 1915, would be obvious to any one—such as what took place between him and the respondents; were his wages paid daily as he left work or at the end of the week; under what circumstances did he cease to work on the 14th and go back to work on the 22nd; and what were the terms of the provisional agreement. None of these vital details were proved; and one is left to grope through the arguments and admissions of counsel to ascertain the facts which ought to have appeared plain and clear on the face of the county court judge's notes. The final agreement of September 2, 1915, which was copied on to the contract book of each colliery, signed by the deceased amongst others, was given in evidence. From its 30th paragraph it appears that it was to continue in force from July 15, 1915 (the very first day on which the deceased ceased to work), till the termination of the war, &c., &c. The agreement secures to the respondents' workmen, including the deceased, an increase of wages, and yet one is left in ignorance, as far as the notes are concerned, whether the deceased's wages for the seven days he did not work were or were not paid, or if paid, at which rate. The case seems to have been conducted on the assumption that a workman can terminate a contract of service simply by breaking it, by absenting himself—downing tools, as I believe it is styled. That is not so. No one party to a contract can, in the absence of a special provision, terminate it. He may, by repudiating it or by doing something in breach of it, furnish a justification to the other party to the contract to terminate it, but that is a wholly different thing. I find it, therefore, impossible to determine whether or not the contract of service existing between the deceased and the respondents was terminated between July 14 and July 22, 1915. In some cases, such as that of dock labourers, the man is, I believe, employed for the day and paid off at night. There is a new contract of service entered into each morning; but a continuous and unbroken succession of such contracts as these for three years might form the basis of an employment for three years. The rules do not require that one contract of service should cover the whole period of three years. It is the employment which is to cover

H. L. (E.) 1918

PRICE v. GUEST, KEEN AND NETTLEFOLDS.

Lord Atkinson.

that period in order to bring the case within the first limb of the rule. I do not refer to the other necessities of the employment, as they do not touch the case.

Again, if a workman contracts with his employer to perform certain services he will continue to be in the employment of his employer though he may not actually perform those services. Physical conditions may render the performance of them impossible, as, for instance, if a ploughman be hired to plough land and snow falls, or frost intervenes which renders ploughing impossible. The servant discharges his duty while his contract lasts if he is ready and willing to do that which his contract of service binds him to do. If he refuses to render these services, or is unable to render them, that may, and under most circumstances would, furnish just cause for his dismissal, but does not by itself terminate his contract of service. Illness, for instance, might be of such a temporary character that, though disabling the workman from performing his service while it lasted, it would not justify his dismissal, or it might be of such a permanent character that it would justify it.

Par. 2 of the above-mentioned rule purports to give a definition of employment by the same employer. As it stands it is rather absurd. It leaves untouched the case of voluntary absence. The employment may be interrupted by that kind of absence, either by the permission of the master, as for instance if the servant gets a holiday, or against the will of the master, and the employment would be continuous as long as the master does not dismiss the servant. I cannot but think that some slip has occurred in the drafting of this rule. I think the intention must have been to provide that the employment should be taken to be continuous, notwithstanding that it was, in fact, interrupted by absence due to illness or some other unavoidable cause. It seems to me absurd to provide that if a master should keep a servant in his house during his illness, continue to pay him his wages, and then dismiss him from his service, that illness is to be treated as an interruption of his employment while, though disabled from performing his duty, he might be willing to perform his duty if he was able. Fortunately, however, we have not to construe this paragraph of the rule in the present case. One of the many strange things about this strange case is that, in the particulars which the claimant is bound to deliver,

the earnings of the deceased in the employment of the employer by whom he was immediately employed are stated to be 2*l.* per week from July 15, 1915, thus covering the seven days when he did not work. I do not think the claimant is estopped by this statement; but it gives some clue to the view which the parties took of the result of the arrangements which had been made. In my opinion the claimant, upon whom the burden of proof lies, has failed to discharge that burden and to show that there was such an interruption in the employment of her husband during the three years preceding his death as enables her to bring her claim under the second limb of the above-mentioned rule.

For this reason I therefore think that the judgment appealed from was right and should be affirmed, and the appeal be dismissed with costs here and below.

LORD WRENBURY. My Lords, many a statute has been the fruitful parent of litigation. But I know of none that is comparable in this respect with the Workmen's Compensation Act. The present case is another example of the capacity of that Act to raise disputable questions.

The Act of 1897 in Sched. I., art. 1 (*a*) (i.), had provided compensation in case of death, and had provided means of fixing its amount in each of two alternatives or what were no doubt meant to be alternatives. They were not true alternatives. The first is expressed thus: "a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds," with a certain deduction. The second is: "if the period of the workman's employment by the said employer has been less than the said three years." The former seems to contemplate continuous earning during the three years, while the latter is satisfied by a continuous employment during the three years. As matter of construction these ought to be read, if possible, as true alternatives. To achieve that result I will read each as contemplating a continuous employment at a continuous wage. The idea underlying the provisions seems to be this. If a man has been earning without interruption during three years his compensation is to be

H. L. (E.) 1918

PRICE v. GUEST, KEEN AND NETTLEFOLDS.

Lord Wrenbury.

equal to the aggregate sum earned. But if for six weeks or six months during the time he has not earned wages the aggregate sum would be so much the smaller. He is not to suffer for this. If the aggregate is less than a three years' aggregate he comes under the second alternative and gets 156 times his average weekly earnings during the period of his actual employment.

If the employment be, say, such as that of a miner, who is paid once a week for such number of hours or shifts or days or for such amount of piecework as he does during the week, there will have been a continuous employment at a continuous wage, and none the less because he does not work such a larger number of hours or days or to such a larger extent as he might have done had he chosen.

The clause, it is true, does not speak of continuous earning or of continuous employment, but in fact, and as matter of decision, the true construction involves continuity. Continuity, however, does not necessarily involve the absence of intervals. A man who during three years is employed for an eight-hour day, or for five days in each week or for a less number of days in each week, is continuously employed for three years if his employment for those respective periodic times continues without interruption for three years. *Hathaway* v. *Argus Printing Co.* (1) was a case of that kind.

It was found, no doubt, that the provisions above described left something to be desired in the matter of certainty, and presumably the new provisions in the Act of 1906 were intended to assist the matter. That Act introduced the clause No. 2 which is found in Sched. I. of that Act. This starts with the word "earnings" and "average weekly earnings," emphasizing what I think had appeared already, that continuous earnings, and not subsisting contract of employment, was the dominant idea and was the thing which the new provision was going to explain. Of the many difficulties which this clause 2 created the only one that has any bearing upon the present case is (*c*). It purports to define the meaning of employment by the same employer. It says nothing about earnings, and is addressed exclusively, it would seem, to the continuing existence of a contract of service. Its concluding words seem to say that if continuity is interrupted by absence from work due to illness or any other unavoidable cause there is not continuous employment,

(1) [1901] 1 K. B. 96.

and the first alternative is excluded. The language is satisfied even if the man's wages were paid in full during his absence from work. Inferentially, if continuity is interrupted by another cause, say voluntary absence from work, there is continuous employment, and the first alternative is not excluded. Neither of these will work with the intention above suggested, namely, that the first alternative is to apply if there are continuous wages during the three years. But, happily for the decision of the present case, it is not necessary to ascertain what the last words of clause (*c*) mean. Upon the best consideration I can give to the statute it seems to me that, if for three years there has been a continuing employment under which the workman had the opportunity of continuously earning wages when and as his services were required or were given, the first alternative applies.

Taking this view of the meaning of the statute, I turn to the facts of this case.

The widow here applies for compensation. The onus is on her to prove the facts establishing her right to compensation under such alternative as she asserts to be applicable. She delivered particulars, and by the 6th particular she claimed that the period of employment had been less than three years, and that the earnings had been over 2*l.* a week from July 15, 1915. The employer in answer to that particular asserted that the employment had been for three years. He did not traverse the widow's statement as to earnings from July 15 if the widow was right that the employment had been for less than three years. The county court judge found as a fact that for the period beginning with June 30, 1915, there was a contract, and further found that it "came to an end" on July 14. He further found as a fact that "during the seven days the men were away" (namely, from July 15 to July 22) "there was no engagement at all." There was, I think, no evidence to support these findings. The evidence is exceedingly meagre. To avoid sending the matter back to the county court judge to arrive at a better finding of the facts the parties agreed certain facts before the Court of Appeal. It was agreed that no notice was given by the workman on July 14, that the men simply refrained from going to work on July 15, and that they did not even take their tools from the pit, and that at the end of the week they resumed work. It had been

H. L. (E.) 1918

PRICE v. GUEST, KEEN AND NETTLEFOLDS.

Lord Wrenbury.

proved that Price returned to work on the provisional agreement, and it was agreed that the provisional agreement contained terms which were subsequently confirmed and put into writing in the agreement of September 2. That agreement provided (article 30) that "This agreement shall continue in force from July 15, 1915, until," &c. Article 32 provided that a copy of the agreement should be placed in a contract book at the colliery which should be signed by each workman as one of the terms of his engagement. Price signed that book. There is evidence, therefore, of continuous employment, and there is no evidence to support a finding that there was a breach of continuity of employment. The widow, by the particulars, asserted that there was employment "from July 15," the date of the suggested discontinuance, and the other facts establish a continuous state of things under which the workman had his employment open to him if he chose to avail himself of it, and would have been entitled to his wage if he had worked. It is, then, not material that he did not work. There was interruption of work, but no interruption of employment.

It was for the claimant to prove that there had not been continuous employment for three years. The county court judge found that she had proved it. But there was no evidence to support his finding. The decision of the Court of Appeal, in my judgment, was right, and this appeal must be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 17, 1918.

Solicitors for appellant: *Warren & Warren, for Edward Roberts & Lewis, Dowlais.*

Solicitors for respondents: *Ullithorne, Currey & Co., for D. W. Jones & Co., Merthyr Tydfil.*

[HOUSE OF LORDS.]

LONDON JOINT STOCK BANK, LIMITED . APPELLANTS ; H. L. (E.)* 1918

AND

MACMILLAN AND ARTHUR . . . . . RESPONDENTS. *June* 21.

Bank—Customer—Mandate—Cheque—Negligence of Customer in Mode of Drawing Cheque—Space for Amount in Words left Blank—Alteration of Amount of Cheque by Forgery.

A customer of a bank owes a duty to the bank in drawing a cheque to take reasonable and ordinary precautions against forgery, and if as the natural and direct result of the neglect of those precautions the amount of the cheque is increased by forgery, the customer must bear the loss as between himself and the banker.

A firm, who were customers of a bank, entrusted to a confidential clerk, whose integrity they had no reason to suspect, the duty of filling in their cheques for signature. The clerk presented to one of the partners of the firm for signature a cheque drawn in favour of the firm or bearer. There was no sum in words written on the cheque in the space provided for the writing and there were the figures "2.0.0" in the space intended for figures. The partner signed the cheque. The clerk subsequently added the words "one hundred and twenty pounds" in the space left for words and wrote the figures "1" and "0" respectively on each side of the figure "2," which was so placed as to leave room for the interpolation of the added figures. The clerk presented the cheque for payment at the firm's bank and obtained payment of 120*l.* out of the firm's account :—

Held, that the firm had been guilty of a breach of the special duty arising from the relation of banker and customer to take care in the mode of drawing the cheque ; that the alteration in the amount of the cheque was the direct result of that breach of duty ; and that the bank were therefore entitled to debit the firm's account with the full amount of the cheque.

Young v. *Grote* (1827) 4 Bing. 253 approved.

Scholfield v. *Earl of Londesborough* [1896] A. C. 514 distinguished.

Colonial Bank of Australasia v. *Marshall* [1906] A. C. 559 considered.

Decision of the Court of Appeal [1917] 2 K. B. 439 reversed.

Per Lord Shaw of Dunfermline : In the case of a customer's cheque, admittedly genuine, no responsibility rests upon the banker for what has happened to the cheque before its presentation to the bank, but the responsibility for what has happened to it between the dates of signature and presentation rests upon the customer.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Sankey J. (2)

* *Present :* LORD FINLAY L.C., VISCOUNT HALDANE, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

(1) [1917] 2 K. B. 439. (2) [1917] 1 K. B. 363.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

The respondent firm, Messrs. Macmillan and Arthur, were customers of the appellants, the London Joint Stock Bank.

The question raised by the appeal was whether the appellants were entitled to debit the respondents' account with the full amount of a cheque, which when presented for payment appeared to be a cheque for 120*l.*, by reason of the alteration of the amount by the forgery of the respondents' clerk Klantschi, or whether they were only entitled to debit the account with 2*l.*, the amount for which the cheque was signed and issued by the respondents.

The facts are fully stated in the judgment of the Lord Chancellor and are summarized in the head-note.

The appellants having paid 120*l.* on the cheque to Klantschi debited the respondents' account with that amount.

The respondents brought an action against the appellants, claiming a declaration that the appellants were not entitled to debit the respondents' account in respect of the cheque beyond the amount for which it was originally drawn.

Sankey J. found that the respondents were not guilty of any negligence in the mode of signing the cheque, and that, assuming that they had been guilty of negligence, the negligence was not the proximate cause of the loss. He therefore ordered judgment to be entered for the respondents for 118*l.*

The Court of Appeal (Swinfen Eady L.J., Bankes L.J. and Bray J.) agreed with the conclusions of the learned judge.

1918. April 12, 15, 16, 18, 19. *Douglas Hogg K.C.* (with him *Alexander Neilson*) for the appellants. The appellants are entitled to judgment on the authority of *Young* v. *Grote* (1), which is substantially similar to the present case. That case may be supported on two principles. The first principle, which was adopted by three out of the four judges who decided the case, is based on the hypothesis that the document was a completed instrument when it left the hands of the drawer. On that hypothesis two questions arise: Has the drawer been careless in the mode of drawing the instrument? Does he owe any duty to the bank not to be careless? Best C.J., in effect, answers both these questions in the affirmative, and, after quoting a passage from Pothier's Traité des Contrats de Change,

(1) 4 Bing. 253, 259.

Part I., c. iv., s. 99, in support of this view, says: "We decide here on the ground that the banker has been misled by want of proper caution on the part of his customer." Burrough and Gaselee JJ. take the same view. The other principle on which the case can be explained proceeds on the hypothesis that the document when it left the hands of the drawer was an incomplete instrument, and, although a customer is not responsible for a payment made on a cheque which is not his genuine order, yet if he signs a cheque leaving the spaces for the amount wholly or partially blank he is estopped from denying that the cheque is his genuine order, though it is filled up with a figure in excess of the authority. That is the view adopted by Park J. Both principles are right and either is sufficient for the appellants in the present case. The Court of Appeal were wrong in treating *Young* v. *Grote* (1) as no longer a binding authority; it has been approved in several cases, and the only case in which it has been definitely disapproved is *Colonial Bank of Australasia* v. *Marshall* (2), a decision of the Privy Council. Taking the authorities in order of date: in *Whitmore* v. *Wilks* (3) Lord Tenterden's judgment shows that it is the duty of a customer to draw his cheques in such a form as not to be easily alterable to a larger amount. In *Robarts* v. *Tucker* (4), which decides that a banker is liable if he pays on a forged indorsement, Parke B. quotes *Young* v. *Grote* (1) without disapproval, but his explanation of that decision differs in the different reports of the case. In the report in the Queen's Bench Reports he is reported to have explained the decision on the ground that the customer by signing a blank cheque gave authority to any person in whose hands it was to fill up the cheque in whatever way the blank permitted. But in the reports in the *Law Journal* and the *Jurist* the decision is explained on the ground of negligence in the manner of drawing the cheque itself. In *Barker* v. *Sterne* (5) Pollock C.B. discusses *Young* v. *Grote* (1) without disapproval and leaves open the question which of the two principles above stated is the better ground for supporting the decision. In *Orr & Barber*

(1) 4 Bing. 253.
(2) [1906] A. C. 559.
(3) (1828) 3 Car. & P. 364.
(4) (1851) 16 Q. B. 560, 579; 20 L. J. (Q.B.) 270, 273; 15 Jur. (O.S.) 987, 988.
(5) (1854) 9 Ex. 684.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

v. *Union Bank of Scotland* (1) Lord Cranworth states the principle of *Young* v. *Grote* (2) to be, "where the customer's neglect of due caution has caused the bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine," and he approves that principle, subject to a doubt whether the conclusion in point of fact in that case was well warranted; and in *British Linen Co.* v. *Caledonian Insurance Co.* (3) he expresses himself substantially to the same effect. In *Bank of Ireland* v. *Trustees of Evans' Charities* (4), which was a case of negligence in the custody of a corporation seal, whereby the secretary was enabled to forge a number of transfers, Parke B., delivering the unanimous opinion of the judges who were called in to assist the House, approved *Young* v. *Grote* (2), which he based upon want of proper caution in the mode of drawing the cheque, but stated that the negligence, to deprive the customer of his right against the bank, must be negligence in or immediately connected with the transaction itself. Lord Cranworth also approves the principle of *Young* v. *Grote* (2), which he again puts upon the ground of estoppel, and Lord Brougham concurs in that approval, subject to a doubt whether the case was rightly decided on the facts. The decision of the House was that mere negligence in the custody of the corporation seal did not amount to an implied authority to execute a transfer of stock standing in the name of the corporation, and that the corporation—or its trustees—were not responsible for the forged transfers. That case shows the distinction between a case where the principal gives authority to his agent to issue a negotiable instrument, which is fraudulently filled up with an amount in excess of the authority, and a case where he gives no authority to issue any instrument at all. The authority of *Young* v. *Grote* (2) was again recognized in *Ex parte Swan* (5) by Erle C.J. and Keating, Williams, and Willes JJ., and by Martin and Channell BB. in *Swan* v. *North British Australasian Co.* (6), which was a later stage of the same litigation; and in the same case in the

(1) (1854) 1 Macq. 513, 523.
(2) 4 Bing. 253.
(3) (1861) 4 Macq. 107, 114.
(4) (1855) 5 H. L. C. 389, 410, 413, 415.
(5) (1859) 7 C. B. (N.S.) 400, 431, 440, 445, 448.
(6) (1862) 7 H. & N. 603, 645, 660; (1863) 2 H. & C. 175, 182, 189.

Exchequer Chamber Blackburn J. distinguishes *Young* v. *Grote* (1) without disapproving it, and Cockburn C.J. treats it as a binding authority, but, rejecting the estoppel theory of that decision, puts it on negligence. In *Halifax Union* v. *Wheelwright* (2) *Young* v. *Grote* (1) was followed by the Court of Exchequer, and Cleasby B., delivering the judgment of the Court, discusses the grounds for supporting the decision, and adopts the explanation given by Cockburn C.J. In *Arnold* v. *Cheque Bank* (3) Lord Coleridge C.J., delivering the judgment of the Court, says that *Young* v. *Grote* (1) must be considered as well decided, and bases the decision upon want of proper caution in the mode of drawing the cheque. *Baxendale* v. *Bennett* (4) is the first case in which the authority of *Young* v. *Grote* (1) has been in any way impeached. Bramwell L.J. does not question the decision, but Brett L.J. throws doubt upon it upon the authority of *Bank of Ireland* v. *Trustees of Evans' Charities* (5), which he said had shaken *Young* v. *Grote* (1) and *Coles* v. *Bank of England*. (6) That is a misconception. The Lords did throw doubt upon *Coles* v. *Bank of England* (6), but they in no way infringed upon *Young* v. *Grote*. (1) In *London and South Western Bank* v. *Wentworth* (7) Pollock B., delivering the judgment of the Court, said that the principle of *Young* v. *Grote* (1) had always been upheld. In *Staple of England* v. *Bank of England* (8), where the point decided was that the negligence was not the proximate cause of the loss, *Young* v. *Grote* (1) was again recognized as an authority, and particularly by Lord Esher, who there treats the principle of that case as having been affirmed by the House of Lords in *Bank of Ireland* v. *Trustees of Evans' Charities*. (5) In *Bank of England* v. *Vagliano Brothers* (9) none of the Lords cast any doubt upon *Young* v. *Grote* (1), which was expressly recognized by Lord Bramwell and Lord Field, who took the strongest view against the bank. In *Scholfield* v. *Earl of Londesborough* (10) Charles J., observing upon Brett L.J.'s criticism of *Young* v. *Grote* (1) in *Baxendale* v.

(1) 4 Bing. 253.
(2) (1875) L. R. 10 Ex. 183.
(3) (1876) 1 C. P. D. 578, 586.
(4) (1878) 3 Q. B. D. 525, 529, 533.
(5) 5 H. L. C. 389.
(6) (1839) 10 Ad. & E. 437.
(7) (1880) 5 Ex. D. 96, 105.
(8) (1887) 21 Q. B. D. 160, 163, 172.
(9) [1891] A. C. 107, 136, 170-1.
(10) [1894] 2 Q. B. 663; [1895] 1 Q. B. 536, 550, 556.; [1896] A. C. 514, 522, 534-7, 544-6, 548, 550.

H. L. (E.) 1918 LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

Bennett (1), says that that case was not in any way disapproved in *Bank of Ireland* v. *Trustees of Evans' Charities* (2), and that it had been recognized in many subsequent cases. In the Court of Appeal Lord Esher speaks of that decision as the fount of bad argument (not bad law), and Rigby L.J. also throws doubt upon it, but he misapprehends the effect of the decision. Lopes L.J., who differed, held that the principle of *Young* v. *Grote* (3) applied. In the House of Lords the House, though invited by Lord Halsbury to overrule *Young* v. *Grote* (3), did nothing of the kind. Lord Watson expressly recognizes that decision, but treats it as doubtful whether it proceeded on the doctrine of Pothier as quoted by Best C.J., or upon the ground that a customer, by signing a blank cheque, had undertaken liability for any sum which might be filled in before it was presented for payment; but he held that the principle of that case had no application as between the acceptor of a bill of exchange and a subsequent holder. The other noble and learned Lords also confine the operation of that decision to the case of mandant and mandatory, such as customer and banker. The two actions of *Union Credit Bank* v. *Mersey Docks and Harbour Board* (4) are instructive as showing the extent and the limits of the doctrine of *Young* v. *Grote*. (3) Both were cases of mandant and mandatory, but, instead of a cheque, the instrument in each case was a delivery order. In the first case several hogsheads of tobacco in the custody of warehousemen were pledged with a bank to secure an advance, and the pledgor, having repaid the advance on one of the hogsheads, presented to the bank for signature a delivery order, in which the place for the quantity was left blank, and, after signature, filled in the blank space with the full number of hogsheads. In an action by the bank against the warehousemen for conversion Bigham J. held that the claim failed, as the bank had impliedly given the pledgor authority to fill up the blank and were estopped from asserting that that authority was limited. In the second case two separate consignments of tobacco were pledged in the same way, and the pledgor, having paid off the advance on one consignment, presented to the bank for signature a properly drawn delivery order in respect of it and subsequently added the description of the other consignment.

(1) 3 Q. B. D. 525.
(2) 5 H. L. C. 389.
(3) 4 Bing. 253.
(4) [1899] 2 Q. B. 205, 211, 214.

In that case it was held that the action would lie, as the bank had been guilty of no negligence which was the proximate cause of the wrongful delivery. The decision in the first case, like the decision in *Halifax Union* v. *Wheelwright* (1), is a direct authority in the appellants' favour. Bigham J. there recognizes and applies *Young* v. *Grote* (2), which he puts upon the ground of estoppel, but in the second case he criticizes that decision, it is submitted wrongly, so far as it proceeds upon negligence. *Imperial Bank of Canada* v. *Bank of Hamilton* (3) was like *Scholfield* v. *Earl of Londesborough* (4), as the relation between the two banks was that of holder and acceptor. Lord Lindley, delivering the judgment of the Judicial Committee, criticizes *Young* v. *Grote* (2) and suggests that it is not right, but he was dealing with the case of holder and acceptor, as between whom there is no duty corresponding to that which exists between banker and customer. *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (5) was a case of pure forgery, and it was held that the bank were liable; but Kennedy J. recognizes that the relation of banker and customer involves a duty on the customer to be careful not to facilitate a fraud, and that the customer may be liable for negligence if it is immediately connected with the transaction complained of. *Colonial Bank of Australasia* v. *Marshall* (6) was a customer and banker case, but the cheques, when they left the two innocent drawers' hands, were completely filled up, and that fact distinguishes the case from the present. But, unless distinguishable, it is submitted that the judgment in that case is not correct. Sir Richard Wilson, delivering the opinion of the Judicial Committee, recognizes the distinction established by *Scholfield* v. *Earl of Londesborough* (4) between acceptor and holder and banker and customer, though he afterwards ignores that distinction, but his opinion proceeds upon a misapprehension of that authority, inasmuch as it treats it as a decision that if any duty had existed between the parties there had been no breach, a proposition upon which the House refrained from expressing any opinion. *Lloyd's Bank* v. *Cooke* (7) and *Smith* v. *Prosser* (8) aptly illustrate the distinction

(1) L. R. 10 Ex. 183.
(2) 4 Bing. 253.
(3) [1903] A. C. 49, 54.
(4) [1896] A. C. 514.
(5) (1906) 11 Com. Cas. 255, 266-7.
(6) [1906] A. C. 559.
(7) [1907] 1 K. B. 794.
(8) [1907] 2 K. B. 735, 752.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

between the case in which no authority has been given to issue any instrument at all and the case in which some authority has been given but the authority has been exceeded. The statement of the law by Fletcher Moulton L.J. in the latter case supports the appellants' contention. *Kepitigalla Rubber Estates* v. *National Bank of India* (1) was again a case of pure forgery. [He also referred to *Ingham* v. *Primrose* (2), *Société Générale* v. *Metropolitan Bank* (3), *Garrard* v. *Lewis* (4), *Marcussen* v. *Birkbeck Bank* (5), *Brocklesby* v. *Temperance Building Society* (6), and *Adelphi Bank* v. *Edwards.* (7)] In Scotland also *Young* v. *Grote* (8) has been treated as good law: Bell's Commentaries, 7th ed., vol. 1, p. 416.

[VISCOUNT HALDANE. Mr. Bell's statement of the law is too wide and is inconsistent with *Scholfield* v. *Earl of Londesborough.* (9)]

It is a mistake to suppose that the principle of *Young* v. *Grote* (8) has ever been judicially overruled. It has been approved in several cases and has been affirmed by the House of Lords, adopting the unanimous opinion of the judges of the Queen's Bench, in *Bank of Ireland* v. *Trustees of Evans' Charities.* (10) *Scholfield* v. *Earl of Londesborough* (9) is not an authority against the appellants, because, notwithstanding Lord Halsbury's observations, *Young* v. *Grote* (8) was expressly approved by five out of the six Lords who took part in that decision. The mistake arose partly from the slip of Brett L.J. in *Baxendale* v. *Bennett* (11) and partly because the case has been treated as deciding propositions which it did not purport to decide—e.g., in cases where no authority was given to execute a negotiable instrument and cases where no duty to take care existed between the parties. Subject to that qualification, there is no ground for saying that *Young* v. *Grote* (8) is not good law or that it does not apply. Further, apart from *Young* v. *Grote* (8), treating it as a decision on negligence, the appellants are entitled to succeed on the ground that the drawer authorized the clerk to fill

(1) [1909] 2 K. B. 1010.
(2) (1859) 7 C. B. (N.S.) 82.
(3) (1873) 27 L. T 849.
(4) (1882) 10 Q. B. D. 30.
(5) (1889) 5 Times L. R. 463, 646.
(6) [1895] A. C. 173, 181.
(7) (1882) Unreported. Cited in [1896] A. C. 540.
(8) 4 Bing. 253.
(9) [1896] A. C. 514.
(10) 5 H. L. C. 389.
(11) 3 Q. B. D. 525.

up the cheque, which was in the same position as a blank cheque, and he is liable for the act of his agent.

Holman Gregory K.C. and *Jowitt* for the respondents. *Young* v. *Grote* (1) at the highest amounts to this: If a customer by his act or omission misleads the bank, and loss is sustained as the natural result of that act or omission, the customer is responsible for the loss. It is not necessary to quarrel with that principle. That involves two questions of fact: 1. Was there a negligent act or omission by the customer? 2. Was the loss sustained as the natural result thereof? In that case the facts found by the arbitrator precluded any discussion of those questions by the Court, and the findings of the arbitrator are no authority against the respondents in this case. The question for the Court was, Was there a duty which involved that negligence? And the Court held that there was. It is in that sense that *Young* v. *Grote* (1) has been approved. This appears from the passage quoted by the appellants from Lord Cranworth's opinion in *Orr & Barber* v. *Union Bank of Scotland* (2), from the observations of Lord Selborne, Lord Bramwell, and Lord Field in *Bank of England* v. *Vagliano Brothers* (3), and from the discussion of the authorities by Lord Macnaghten in *Scholfield* v. *Earl of Londesborough*. (4) Here Sankey J. has found (*a*) that the respondents were not guilty of any negligence which misled the bank, and (*b*) that if they were guilty of negligence it was not negligence which caused the loss. The learned judge was entitled so to find, and the Court of Appeal have adopted his findings. Both those questions are questions of fact, and *Young* v. *Grote* (1) contains nothing which compels a judge to come to a conclusion of fact which as a business man he would not have come to. In the absence of misdirection these findings are conclusive in the respondents' favour. This is distinguishable from the case of a blank cheque. What the clerk had to do was to complete the cheque for 2*l*. The cheque was sufficiently filled up before signature to make it a mandate for the payment of 2*l*., but it was not completely filled up, and the only authority to the clerk was to fill up the blank space. The drawer having inserted the figure, the authority of the clerk was limited to

(1) 4 Bing. 253.
(2) 1 Macq. 513, 523.
(3) [1891] A. C. 107, 126, 136, 170.
(4) [1896] A. C. 514, 544-6.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

writing in the words "Two Pounds." It is submitted that the banker might legally have paid the cheque in the form in which it left the hands of the drawer, though it may be doubtful whether he would have done so. The intervention of a crime is a new and independent factor, and the circumstance that the customer's conduct gave occasion for the fraud is not sufficient to render him liable: *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (1); *Farquharson Brothers & Co.* v. *King & Co.* (2) It was not the form in which the drawer drew the cheque which misled the banker, but the intervening crime. The banker must show that the customer caused him to pay the money on the forged cheque, as, for example, where the customer knows that a forged cheque is in circulation and neglects to notify the bank. At any rate, the intervention of a crime is an important factor in determining whether the customer has been guilty of negligence, and negligence has been negatived by Sankey J. The mere fact that a cheque is so drawn that spaces left in it can be utilized for forgery is not in itself any violation of the duty owed by a customer to the bank, nor is the fact that the drawer has left to a clerk the completion of the cheque by filling up the empty spaces, as the bank would not have been misled thereby. The bank was misled by the criminal act of altering the figures: *Colonial Bank of Australasia* v. *Marshall.* (3) [They also referred to *Marcussen* v. *Birkbeck Bank* (4), *Colonial Bank* v. *Cady* (5), *Seton, Laing & Co.* v. *Lafone* (6), *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (7), and Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3, s. 9, sub-s. 2, and s. 20.]

Alexander Neilson replied.

The House took time for consideration.

June 21. LORD FINLAY L.C. My Lords, this is a case raising an important question of commercial law as to the relations between banker and customer. It has been argued with conspicuous ability by all the counsel engaged on the appeal.

(1) 11 Com. Cas. 255, 267.
(2) [1902] A. C. 325, 335.
(3) [1906] A. C. 559.
(4) 5 Times L. R. 462, 646.
(5) (1890) 15 App. Cas. 267.
(6) (1887) 19 Q. B. D. 68, 70.
(7) [1918] A. C. 350.

The plaintiffs in the action (now respondents), Messrs. Macmillan & Arthur, are a firm of general merchants in the City. The defendants (appellants) carry on business as bankers, and the plaintiffs kept their account at one of their branches. The action was brought by the plaintiffs to have it declared that the defendants are not entitled to debit the plaintiffs with a cheque for 120*l.*, which had been paid by the defendants to one Klantschi, by whom it had been fraudulently filled up for 120*l.* instead of 2*l.* The bank resist the claim on the grounds that the plaintiffs had drawn the cheque so negligently as to lead to the fraud, and that the plaintiffs had entrusted the cheque, signed by them, to Klantschi authorizing him to fill it up.

Sankey J., before whom the case was tried, gave judgment for the plaintiffs, and his judgment was confirmed by the Court of Appeal (Swinfen Eady L.J., Scrutton L.J., and Bray J.). The bank now appeal to your Lordships' House.

The case was treated in the Courts below as turning upon the question whether the case of *Young* v. *Grote* (1), so often cited and so much discussed, is now good law. Both Courts below held that that case is no longer of authority, and that the bank could not rely upon it as a defence.

The facts of the case lie in small compass, and may best be stated in the language of Sankey J. (2): "The facts are as follows: The plaintiffs had in their employment a confidential clerk of the name of Klantschi. He had been with them for some years and they had no reason to distrust him. They left to him the keeping of their books and the filling in of cheques for signature. On the morning of February 9, 1915, one of the plaintiff partners, Mr. Arthur, was going out to lunch about mid-day. He had his hat on and was leaving the office when the clerk came up to him and said he wanted 2*l.* for petty cash and produced a cheque for signature. The clerk had repeatedly presented cheques for signature to get petty cash, but usually for 3*l.*, and Mr. Arthur asked him why it was not 3*l.* on this occasion. The clerk replied that 2*l.* would be sufficient. Mr. Arthur thereupon signed the cheque, which I shall discuss more in detail later on. On the next day the clerk did not come to business. Mr. Arthur took the opportunity to look through

(1) 4 Bing. 253. (2) [1917] 1 K. B. 363, 364.

H. L. (E.) 1918 — LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR. — Lord Finlay L.C.

the clerk's books and found matters which so excited his suspicion that he consulted his solicitor, and on February 11 both he and the solicitor went to the bank. They there found that the clerk had presented a cheque for 120*l.*, which had been paid to him. The clerk was a thief and absconded with the money. His books were subsequently examined, and in the result a number of discrepancies were found." The learned judge went on (1): "I recollect that Mr. Arthur was in a great hurry when he signed the cheque, and I find the fact to be that when he signed it there were no words at all in the space left for words; that space was a blank. There were the figures '2.0.0' in the space left for figures. The clerk, having obtained Mr. Arthur's signature to the cheque in this condition properly dated and payable to 'ourselves,' added the words 'one hundred and twenty pounds' in the space left for words, and the figures '1' and '0' on either side of the figure '2.'"

The following is a copy of the cheque, a facsimile of which is before your Lordships:—

"No. 0059745. "London, Feb. 9, 1915.

"The

LONDON JOINT STOCK BANK LIMITED,

Charterhouse Street Branch, 89, Charterhouse St., E.C.

"PAY TO Ourselves or Bearer

One hundred and twenty pounds

£120.0.0

Macmillan & Arthur."

The only fact which it is necessary to add to the learned judge's statement is that, as was proved, the figure "2" which was in the cheque when Mr. Arthur signed it was some way from the left-hand side, and that there was room there, and also on the right-hand side of the figure "2," for the insertion of another figure. Sankey J. added (1): "Apart from authority, the plaintiffs in my view were not guilty of any negligence up to the time of signing the cheque in question, nor do I think that, having regard to the trust which they rightly reposed in Klantschi, Mr. Arthur was guilty of negligence in signing the cheque as and when he did. Unless, therefore, the state of the authorities is such that I am compelled to hold that the

(1) [1917] 1 K. B. 365.

defendants are under the circumstances entitled to my judgment, my decision will be in favour of the plaintiffs."

This House will accept the findings of fact of the learned judge, concurred in as they were by the Court of Appeal. But his inference from the facts that the plaintiffs were not guilty of negligence stands in a different position. This is a matter of mixed law and fact, on which this House is bound to exercise its own judgment.

The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty. Whether what happened in this case can be considered a natural and direct consequence of the customer's negligence in drawing the cheque is in controversy.

It has been often said that no one is bound to anticipate the commission of a crime, and that to take advantage of blank spaces left in a cheque for the purpose of increasing the amount is forgery, which the customer is not bound to guard against. It has been suggested that the prevention of forgery must be left to the criminal law. I am unable to accept any such proposition without very great qualification. Every-day experience shows that advantage is taken of negligence for the purpose of perpetrating frauds. A warehouseman is bound to take precautions against theft, and if he fails to do so he will be liable to the owner if the goods are stolen. It would be idle for him to contend that he had trusted to the terrors of the criminal law for the prevention of theft.

As the customer and the banker are under a contractual relation in this matter, it appears obvious that in drawing a cheque the customer is bound to take usual and reasonable precautions to prevent forgery. Crime, is indeed, a very serious matter, but every one knows that crime is not uncommon. If the cheque is drawn in

H. L. (E.) 1918 — LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR. — Lord Finlay L.C.

such a way as to facilitate or almost to invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence of this description.

Young v. *Grote* (1) was decided nearly 100 years ago. It has been often approved by many of our greatest judges, and with the exception of a recent case in the Privy Council, with which I shall deal later on, there has never been a decision inconsistent with it but for that now under appeal.

The facts in *Young* v. *Grote* (1) are few and are stated in the award of the arbitrator on which the decision of the Court of Common Pleas was given. Mr. Young, when leaving home for some days, left with his wife five blank cheques signed by him and desired her in his absence to have them filled up for such sums as the purposes of his business might require. Mrs. Young wanted 50*l.* 2*s.* 3*d.* to pay wages, and delivered one of her husband's blank cheques to Worcester, a clerk of his, authorizing him to fill it up for 50*l.* 2*s.* 3*d.* What followed is best stated in the words of the award as set out in the report of the case (2): "Worcester accordingly filled it up with that sum, and shewed it so filled up to Mrs. Young, and she desired him to get it cashed, but the check, when it was so filled up and shewn to Mrs. Young, presented the following appearance: the first line contained in print the names of the bankers; the second line contained the words *Pay wages* or *bearer*, the word *wages* only being in writing, and the third line contained the words *fifty pounds* and the figures 2*s.* 3*d.*; but the word *fifty* commenced in the middle of that third line, and with a small letter, so that ample space in that line was left for the insertion of other words before the word *fifty*: and there was at the bottom of the draft the figures 50.2.3, but the figure 5 was at a sufficient distance from the letter £ to allow another figure to be inserted between it and the letter £." Worcester afterwards fraudulently inserted the words "Three hundred and" before the word "fifty," and the figure "3" before the figure "5." The alterations were so made that they could not have been detected by any ordinary diligence, and the bank paid to Worcester 350*l.* 2*s.* 3*d.* against the cheque and debited the customer with the amount. He objected, alleging that his draft was only for

(1) 4 Bing. 253. (2) 4 Bing. 254-256.

50*l.* 2*s.* 3*d.* The award then proceeds as follows: "The arbitrator thought that it was his draft for that sum only, but he thought, also, that he had been guilty of gross negligence, by causing his draft to be delivered to Worcester (in whose hand-writing the body of it had been filled up) in such a state that the latter could and did, by the mere insertion of other words, make it appear to be the draft of Peter Young for the larger sum; and that as he, partly by his negligence, had caused the bankers to pay the larger sum, he was bound to make good to them the loss, which, by reason of his negligence, they had sustained by paying that sum. If the Court of Common Pleas should think that opinion wrong, then he awarded that Peter Young was entitled to receive from Grote & Co. the sum of three hundred pounds, and ordered accordingly."

It is obvious that the award left to the Court the questions whether the arbitrator was right in thinking that Young had been guilty of gross negligence, and whether he was bound to make good to the bankers the larger sum which they had paid owing partly to his negligence. Best C.J. (1) pointed out the negligence in the manner in which the wife had the cheque filled up, and said that it was by the neglect of ordinary precautions that the bankers were induced to pay. He remarked that in the case of *Hall* v. *Fuller* (2), which had been relied upon, the cheque was properly drawn in the first instance and the forgery consisted in expunging the words and figures and the insertion of others in their place. The Chief Justice concluded his judgment by saying: "We decide here on the ground that the banker has been misled by want of proper caution on the part of his customer." Park J. said that he concurred in the opinion of the arbitrator that Young was guilty of negligence; Burrough J. said that the blame was all on one side; and Gaselee J. that there certainly was gross negligence on the part of Young, and therefore the rule must be discharged.

I have referred at some length to the way in which the Court in the case of *Young* v. *Grote* (3) dealt with the question of negligence for this reason. It has been argued on behalf of the respondents here that that case merely proceeded on the finding of fact by the arbitrator that there was gross negligence. This is not so. The

(1) 4 Bing. 259. (2) (1826) 5 B. & C. 750.
(3) 4 Bing. 253.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

Lord Finlay L.C.

opinion of the Court was invited and given on the question whether the arbitrator was right in finding negligence, as well as on the question whether Young was liable for the loss which ensued. The Court concurred with the arbitrator on both points.

Best C.J. has been criticized for basing his judgment on the well-known passage in Pothier which he quotes (1) as authority for the proposition that if it be by the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again. The passage will be found at p. 61 of the Paris edition (1809) of Pothier's Contrat de Change, with notes by Hutteau. It occurs in the course of a long criticism by Pothier of a passage of the Italian jurist Scacchia (quoted in extenso [1896] A. C. 524—527), in which he discusses the question of the right of a drawee to be recouped by the drawer when by reason of a fraudulent alteration in the draft he has been led to pay more than the sum really drawn for. Pothier criticizes (pp. 59—62) the view of Scacchia and dissents from the wide terms in which the right of indemnity in such cases had been asserted by Scacchia. Pothier treats the question as one of the law of mandate. He cites some illustrations from the Digest, XVII., tit. 1 (Mandati vel Contra), 1.26, s. 6 and s. 7, and Digest, XLVII., tit. 2 (De Furtis), 1.61 (63), s. 5, and concludes with the passage in question : " Cependant, si c'était par la faute du tireur que le banquier eût été induit en erreur, le tireur n'ayant pas eu le soin d'écrire sa lettre de manière à prévenir les falsifications, *putà*, s'il avait écrit en chiffres la somme tirée par la lettre, et qu'on eût ajouté zéro, le tireur serait, en ce cas, tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre, à laquelle le tireur, par sa faute, a donné lieu ; et c'est à ce cas, qu'on doit restreindre la décision de Scacchia." This passage appears to me to be strictly relevant to the case of banker and customer with which Best C.J. was dealing and to embody the principles of English as well as of the civil law. It is after citing this passage from Pothier that the Chief Justice goes on to consider whether it was by the fault of Young that the payment was made.

It was upon this ground, and this ground alone, that *Young* v. *Grote* (2) was decided by three of the four judges of the Common Pleas. It is true that Park J., while concurring in the finding of

(1) 4 Bing. 258. (2) 4 Bing. 253.

negligence, also says (1): "Can any one say that the check signed by Young is not a genuine order? I say it is. The checks left by him to be filled up by his wife, when filled up by her, become his genuine orders." And this is the explanation of *Young* v. *Grote* (2) adopted by Bigham J. in the case of *Union Credit Bank* v. *Mersey Docks and Harbour Board* (3) while rejecting the reason given by the majority, on what, I venture to think, are insufficient grounds. It is true that Young left the cheques signed in blank with his wife to be filled up by her. She by the hand of the clerk filled one up with the correct amount, and the fraudulent alteration was afterwards made by the clerk with whom she had left the cheque merely to get payment of the correct amount. But the additional ground suggested by Park J. and adopted by Bigham J., whether applicable or not to the facts in *Young* v. *Grote* (2), has, as I shall afterwards show, a most important bearing on the case now under appeal. The sole ground upon which *Young* v. *Grote* (2) was decided by the majority of the Court of Common Pleas was that Young was a customer of the bank owing to the bank the duty of drawing his cheque with reasonable care, that he had delegated the performance of this duty to his wife, that she had been guilty of gross negligence in having the cheque filled up in such a manner as to facilitate an increase of the amount, and that the fraudulent alteration of the cheque by the clerk, to whom, after being filled up, it had been entrusted by her for the purpose of getting payment, would not have taken place but for the careless manner in which the cheque was drawn. The duty which the customer owes to the bank is to draw the cheques with reasonable care to prevent forgery, and if, owing to neglect of this duty, forgery takes place, the customer is liable to the bank for the loss. This is the principle expressed in the passage from Pothier cited above. It may be put in various ways. Sometimes it has been said that an estoppel is created, and that as the negligence of the customer enabled the clerk to alter the amount to that which the banker paid, he is estopped from disputing the authority of the banker to pay. Sometimes it has been said that the payment must be allowed in account with the bank in order to avoid circuity of action, the customer being liable to the bank for his

(1) 4 Bing. 260. (2) 4 Bing. 253.
(3) [1899] 2 Q. B. 205, 210, 211.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

Lord Finlay L.C.

negligence, and this latter was the ground on which Cockburn C.J. rested the decision in *Young* v. *Grote* (1) (*Swan* v. *North British Australasian Co.* (2)). In whichever of these ways it may be put, the ground is really one and the same—as the negligence of the customer caused the loss, he must bear it. The fact that a crime was necessary to bring about the loss does not prevent its being the natural consequence of the carelessness. If the door of a warehouse is left unlocked at night, the goods may be stolen, and if a cheque is drawn with neglect of all usual precautions to prevent falsification, the cheque may be falsified. The loss in each case is the result of the omission of ordinary and reasonable precaution. The whole matter is stated by Best C.J. in two sentences (3) ; after stating that it is the rule that if a payment be made without authority the banker not the customer must suffer, he goes on to say, " But though that rule be perfectly well established, yet if it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again," and quotes Pothier's doctrine that, if it was by the fault of the drawer that the banker was misled in the matter, the drawer not having taken care to write the draft so as to prevent falsification, the drawer will be bound to indemnify the banker against loss from the falsification for which the drawer by his fault has given occasion. This is illustrated by what was said about the case of *Young* v. *Grote* (1) in the curious case of *Ingham* v. *Primrose* (4), in which the acceptor of a bill of exchange, intending to cancel it, tore it in half and threw it into the street. The tearing had been done in such a way that the appearance of the bill was consistent with its having been divided for the purpose of safe transmission by the post. The finder of the two pieces pasted them together and put the bill into circulation. The acceptor was held liable at the suit of a bona fide holder. It had been argued on behalf of the defendants that the putting together of the two halves amounted to forgery, and on this point Williams J., in delivering the judgment of the Court of Common Pleas, said (5) that even assuming that the act of reconstructing the bill was a forgery, yet on the principle of *Young* v. *Grote* (1) this would be no answer to the

(1) 4 Bing. 253.
(2) 2 H. & C. 175, 189, 190.
(3) 4 Bing. 258.
(4) 7 C. B. (N.S.) 82.
(5) 7 C. B. (N.S.) 87, 88.

plaintiff's claim, because the defendant, by abstaining from an effectual cancellation or destruction of the bill, had led to the plaintiff's taking the bill for value without notice. Apart from the merits of the decision in that particular case, this judgment is a recognition by a strong Court of the authority of *Young* v. *Grote* (1), and a ruling that the fact that forgery was necessary to take advantage of the negligence would afford no answer.

Of course the negligence must be in the transaction itself, that is, in the manner in which the cheque is drawn. It would be no defence to the banker, if the forgery had been that of a clerk of a customer, that the latter had taken the clerk into his service without sufficient inquiry as to his character. Attempts have often been made to extend the principle of *Young* v. *Grote* (1) beyond the case of negligence in the immediate transaction, but they have always failed.

The grounds of the decision in *Young* v. *Grote* (1) were discussed in 1851, in 1854, and in 1861 by judges of great distinction—Parke B., Pollock C.B., and Lord Cranworth. Parke B. in the well-known case of *Robarts* v. *Tucker* (2) distinguished *Young* v. *Grote* (1) from the case then under consideration. In the report in 16 Q. B. Parke B. is reported as putting the decision in *Young* v. *Grote* (1) on the ground that the customer had signed a blank cheque, giving authority to any one in whose hands it was to fill up the cheque in whatever way the blank permitted, while in 15 Jur. (O.S.) at p. 988 he is reported as saying that in *Young* v. *Grote* (1) there was negligence in the drawing of the cheque itself, which was the authority given by the drawer to the bank. Pollock C.B., in delivering the judgment of the Court in *Barker* v. *Sterne* (3), cites *Young* v. *Grote* (1) and says: "It was held that the loss must fall on the drawer, as it was caused by his negligence. Now, whether the better ground for supporting that decision is, that the drawer is responsible for his negligence, which has enabled a fraud to be practised, or whether it be considered that, when a person issues a document of that kind, the rest of the world must judge of the authority to fill it up by the paper itself, and not by any private instructions, it is unnecessary to inquire. I should prefer putting it

(1) 4 Bing. 253.
(2) 16 Q. B. 560, 579, 580; 15 Jur. (O.S.) 986, 988.
(3) 9 Ex. 684, 687.

H. L. (E.) 1918 LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR. Lord Finlay L.C.

on the latter ground." Lord Cranworth, in giving judgment in your Lordships' House in the Scottish case *Orr & Barber* v. *Union Bank of Scotland* (1), says of *Young* v. *Grote* (2): "The decision went on the ground that it was by the fault of the customer the bank had been deceived. Whether the conclusion in point of fact was in that case well warranted, is not important to consider. The principle is a sound one, that where the customer's neglect of due caution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine." And in 1861 Lord Cranworth in another Scotch case—*British Linen Co.* v. *Caledonian Insurance Co.* (3)—again referred to *Young* v. *Grote* (2) as a case in which there was negligence in the circumstances that were the immediate cause of the payment by the banker, and said the decision proceeded on the ground that negligence on the part of the drawer had afforded the opportunity for the fraud.

To what was said by the three judges whom I have just quoted may be added the observations made by Cleasby B. in delivering the judgment of the Court of Exchequer in *Halifax Union* v. *Wheelwright.* (4) After referring to some variety in the reasons which had been given for the conclusions reached in *Young* v. *Grote* (2) he said: "It is perhaps only an application of one of those general principles which do not belong to the municipal law of any particular county, but which we cannot help giving effect to in the administration of justice, viz., that a man cannot take advantage of his own wrong, a man cannot complain of the consequences of his own default, against a person who was misled by that default without any fault of his own."

Perhaps no case has been more frequently cited than *Young* v. *Grote* (2), and very largely by reason of repeated attempts to pray in aid its principle under circumstances to which it has no real relation.

The first case of this description was that of *Bank of Ireland* v. *Trustees of Evans' Charities.* (5) In that case stock belonging to Evans' Charities registered in the Bank of Ireland had been transferred under powers of attorney to which the seal of the trustees of

(1) 1 Macq. 513, 523.
(2) 4 Bing. 253.
(3) 4 Macq. 107, 114.
(4) L. R. 10 Ex. 183, 192.
(5) 5 H. L. C. 389.

the charities had been fraudulently affixed by the secretary. The jury found that the trustees had contributed to the loss by their negligence in allowing the secretary to have control of the seal, and it was decided by the House of Lords that this afforded no answer to the claim of the trustees to the stock. *Young* v. *Grote* (1) was much discussed in the course of the argument in their Lordships' House. Parke B., delivering the opinion of all the judges, says (2) that negligent custody of the seal was not enough, and that the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid must be negligence in or immediately connected with the transfer itself, and proceeded as follows: "Such was the case of *Young* v. *Grote* (1), on which great reliance was placed in the argument at your Lordships' Bar. In that case it was held to have been the fault of the drawer of the cheque that he misled the banker, on whom it was drawn, by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently, that the drawer, having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment." And Lord Cranworth L.C. said (3): "Now the case of *Young* v. *Grote* (1) went upon that ground (whether correctly arrived at in point of fact is immaterial), that the plaintiff there was estopped from saying that he did not sign the cheque for 350*l.*; and if the circumstances are such, whether arising from negligence, or from any other cause, that as between the customer and his banker, the customer is estopped from saying that he did not sign the cheque for a particular amount, that, as between them, is just the same as if he had signed it. Therefore taking that view of the facts, the case may be well sustained, and appears to have been well decided." This is another way of saying that the customer could not complain of the payment, having caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, to quote the language of Parke B. Lord Brougham (4) cites *Young* v. *Grote* (1) without disapproval, while he goes on to express doubts as to the decision in *Coles* v. *Bank of England*. (5)

(1) 4 Bing. 253.
(2) 5 H. L. C. 409, 410.
(3) 5 H. L. C. 413, 414.
(4) Ibid. 415.
(5) 10 Ad. & E. 437.

H. L. (E.) 1918 — LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR. — Lord Finlay L.C.

A little later in the same year (1859) arose the case of *Ex parte Swan.* (1) The question there arose on a rule nisi to enforce the claim of the applicant to be inserted in the register in respect of shares which had been transferred to third parties under transfers from the applicant which were forgeries. The claim was rested on the ground that the transfers had been executed by the applicant in blank and had been negligently left in the custody of his broker, who afterwards fraudulently filled them up and sold the shares. The Court was equally divided in opinion and the rule dropped. *Young* v. *Grote* (2) was referred to with approval by all the four judges, though they differed as to its applicability. Erle C.J. (3) quotes *Young* v. *Grote* (2) as an authority, and says that it proceeded on the ground that the plaintiff was estopped from setting up against the defendant that the cheque was only 50*l.* inasmuch as it was his negligence by his agent that enabled the fraudulent holder to cheat the banker. Keating J. (4) says it went on the ground that a cheque had been drawn so as to admit easily of alteration. Williams J. says (5): "The case of *Young* v. *Grote* (2) has been recently recognized in this Court, and its authority cannot be disputed." Willes J. distinguished *Young* v. *Grote* (2) as relating to a negotiable instrument.

Next year Mr. Swan brought an action against the company to assert his title to these shares and a case was stated for the opinion of the Court of Exchequer—*Swan* v. *North British Australasian Co.* (6) The four judges before whom the hearing took place were agreed that negligence to operate as an estoppel must be the proximate cause of the loss, but differed in their opinion as to the particular case before them. No dissent from the doctrine of *Young* v. *Grote* (2) was expressed by any of the judges, and Channell B. (7), referring to the fact that *Young* v. *Grote* (2) had been strongly pressed upon the Court, said that it must be considered as explained by Parke B. in *Robarts* v. *Tucker* (8) and by the judges in the House of Lords in *Bank of Ireland* v. *Trustees of Evans' Charities.* (9) The

(1) 7 C. B. (N.S.) 400.
(2) 4 Bing. 253.
(3) 7 C. B. (N.S.) 431.
(4) Ibid. 440.
(5) 7 C. B. (N.S.) 445.
(6) 7 H. & N. 603.
(7) Ibid. 660.
(8) 16 Q. B. 560, 579, 580.
(9) 5 H. L. C. 389.

case was taken to the Exchequer Chamber in 1863 (1), and it was held there, Keating J. dissenting, that the plaintiff was entitled to the shares, the Court holding that negligence to operate as an estoppel must be the proximate cause of the loss. Three of the seven judges referred to *Young* v. *Grote*. (2) Blackburn J., while expressing disapproval of *Coles* v. *Bank of England* (3), expresses no disapproval of *Young* v. *Grote* (2), and on the contrary, after referring to the manner in which *Young* v. *Grote* (2) had been dealt with by Williams J. in *Ex parte Swan* (4) (where, it will be recollected, Williams J. had said that the authority of *Young* v. *Grote* (2) could not be disputed), proceeds thus (5): "It may be that case" (*Young* v. *Grote* (2)) "is to be supported on some of the grounds there stated, or upon the broader ground, apparently supported by the authority of Pothier, in the passage cited in *Young* v. *Grote* (2), that the person putting in circulation a bill of exchange does, by the law merchant, owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations in it; it is not necessary in this case to inquire how that may be." I may remark in passing that this last suggestion is too widely put, as was held by this House in *Scholfield* v. *Earl of Londesborough* (6), but is quite correct as applied to the case of banker and customer with reference to cheques, as in *Young* v. *Grote*. (2) Cockburn C.J. says (7) that *Young* v. *Grote* (2) was not decided on estoppel, but on the ground that, as the loss had been brought about by the negligence of the customer, the latter must bear the loss sustained, and suggested that these facts were held to give a defence to avoid circuity of action. The other judge who refers to *Young* v. *Grote* (2) is the dissenting judge, Keating J., who relied upon its authority. (8) The authority of the case was disputed by no member of the Court, but the circumstances of the case then before the Court were entirely different.

The group of cases to which I have just referred (1855 to 1863) recognize the authority of the decision of *Young* v. *Grote* (2), while establishing that it applies only to cases in which the negligence is

(1) 2 H. & C. 175.
(2) 4 Bing. 253.
(3) 10 Ad. & E. 437.
(4) 7 C. B. (N.S.) 445.
(5) 2 H. & C. 182, 183.
(6) [1896] A. C. 514.
(7) 2 H. & C. 189, 190.
(8) Ibid. 179.

H. L. (E.)
1918
LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.
Lord Finlay L.C.

in the transaction itself and has no application to cases where the fraud has been merely facilitated by negligence in the custody of the seal of a corporation or of transfers in blank. The principle which underlies these decisions is further illustrated in the cases of *Arnold* v. *Cheque Bank* (1), *Baxendale* v. *Bennett* (2), *Staple of England* v. *Bank of England* (3), *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (4), and *Kepitigalla Rubber Estates* v. *National Bank of India.* (5)

In the case of *Arnold* v. *Cheque Bank* (1) evidence to prove that there had been negligence in the custody and transmission of a draft which had afforded facilities for its being stolen by one Hecht, who forged the indorsement of the plaintiffs and obtained payment, was rejected on the ground that the alleged negligence was collateral only to the transaction. The judgment of the Court—Lord Coleridge C.J. and Archibald and Lindley JJ.—refusing a new trial was delivered by Lord Coleridge, who discusses *Young* v. *Grote* (6) and other authorities. (7) He points out that one has only to look at the case itself to see that *Young* v. *Grote* (6) proceeded on the fault of the drawer in the mode of drawing the cheque, "and is entirely consistent with the rule laid down and explained on fuller consideration in subsequent cases, viz. that negligence, in order to estop, must be negligence in the transaction itself." (8)

Baxendale v. *Bennett* (2) was the case of an acceptance in blank without a drawer's name being stolen from an unlocked drawer in which it was kept. Brett L.J. was mistaken in saying (as he does at p. 533-4 in this case) that the decision of the House of Lords in *Bank of Ireland* v. *Trustees of Evans' Charities* (9) had shaken the authority of *Young* v. *Grote* (6) and *Coles* v. *Bank of England* (10), as it will be found, on examination of the passage referred to, that while it is true of *Coles* v. *Bank of England* (10) it is not true of *Young* v. *Grote.* (6) And in *Staple of England* v. *Bank of England* (11) Lord Esher himself explains *Young* v. *Grote* (6) as a case in which the negligence was in or immediately connected with that which

(1) 1 C. P. D. 578.
(2) 3 Q. B. D. 525.
(3) 21 Q. B. D. 160.
(4) 11 Com. Cas. 255.
(5) [1909] 2 K. B. 1010.
(6) 4 Bing. 253.
(7) 1 C. P. D. 586-88.
(8) Ibid. 587.
(9) 5 H. L. C. 389.
(10) 10 Ad. & E. 437.
(11) 21 Q. B. D. 160, 172.

happened, and said that the negligence must be approximately connected with the result.

The case last mentioned was one in which the plaintiffs were held entitled to recover stock belonging to them, which had been transferred under a transfer to which their seal had been fraudulently affixed by their clerk, notwithstanding negligence on their part in the custody of the seal.

The principle was elaborately discussed by Kennedy J. in *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (1) This was a case of banker and customer. Cheques had been forged by the customer's clerk, and the bank set up as a defence that the customer had been negligent in keeping a clerk in his employment knowing that on a previous occasion he had been convicted of forgery. This contention was rejected by Kennedy J., on the ground that to make good such a defence the bank would have to show that it had been misled into making the payments by neglect on the part of the customer in or immediately connected with the forgery or uttering of the cheques, and that the fraud followed as a natural and ordinary result from the negligent conduct of the customer. These are exactly the conditions which existed in *Young* v. *Grote.* (2)

So in *Kepitigalla Rubber Estates* v. *National Bank of India* (3), which was a case of forged cheques, Bray J. laid down that it is the duty of the customer of a bank to use reasonable care in the issuing of mandates, citing *Young* v. *Grote* (2) and other authorities, and went on to say : " I should come to the same conclusion apart from authority. It seems to me to be clearly the duty of a person giving a mandate to take reasonable care that he does not mislead the person to whom the mandate is given." The learned judge goes on to point out that to afford a defence to the banker the breach of duty must be, as in *Young* v. *Grote* (2), in connection with the drawing of the order or cheque, and that there is no obligation as between customer and banker that the person should take precautions in the general carrying on of his business or in examining and checking the pass-book.

The celebrated case of *Bank of England* v. *Vagliano Brothers* (4), which arose out of the forgeries of a clerk named Glyka, came up to

(1) 11 Com. Cas. 255.
(2) 4 Bing. 253.
(3) [1909] 2 K. B. 1010, 1022.
(4) [1891] A. C. 107.

H. L. (E.)
1918
LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.
Lord Finlay L.C.

the House of Lords in 1891. The facts of the case are very different from those now before this House. No doubt was expressed by any of their Lordships who took part in the decision as to the authority of *Young* v. *Grote*. (1) Lord Selborne (2) refers to "the cases in which the drawer of a cheque has been held bound by fraudulent alterations for which the state of the paper afforded space," and appears to rely upon them in support of his reasoning against the liability of the Bank of England. Lord Bramwell (3) refers to *Young* v. *Grote* (1) as an authority, and says that the result of the authorities is "that the conduct of the bank's customer to enable the bank to charge the customer must be conduct directly causing the payment." Lord Field says this (4): "Reliance was placed by the defendants on the case of *Young* v. *Grote*. (1) That case, no doubt, must be considered as well decided; but various opinions have been expressed as to the real ground of the decision. But we have only to look at the case itself to see that it really proceeded on the authority of the extract from Pothier cited in the judgment of Best C.J. which makes the inability to recover depend upon the fault of the drawer of the cheque in the mode of drawing it, and is entirely consistent with the rule laid down and explained on fuller consideration in subsequent cases, viz., negligence in order to estop must be negligence in the transaction itself; see per Blackburn J. in *Swan* v. *North British Australasian Co.*" (5)

A very serious extension of the effect of the decision in *Young* v. *Grote* (1) was attempted in the years 1894 to 1896 in the case of *Scholfield* v. *Londesborough*, decided in the first instance by Charles J. (6), whose decision was confirmed in the Court of Appeal (7) and in your Lordships' House. (8) In that case the defendant had accepted a bill of exchange for 500*l.* drawn upon him by one Sanders, and bearing a stamp sufficient to cover 4000*l.* Before indorsement it was fraudulently altered by the drawer to 3500*l.* by the insertion of the words "three thousand" before the words "five hundred," and the figure "3" before the figure "5." The acceptor was sued on the bill by a holder for value.

(1) 4 Bing. 253.
(2) [1891] A. C. 126.
(3) Ibid. 136.
(4) Ibid. 170, 171
(5) 2 H. & C. 175. 182.
(6) [1894] 2 Q. B. 660.
(7) [1895] 1 Q. B. 536.
(8) [1896] A. C. 514.

It is necessary to state the course of this case somewhat fully, in view of its bearing upon the subsequent case of *Colonial Bank of Australasia* v. *Marshall*. (1) Charles J. held that a person who signs a negotiable instrument, with the intention that it should be delivered to a series of holders, incurs a duty to those who take the instrument not to be guilty of negligence with reference to the form of the instrument, and that if he signs it negligently in such a shape as to render alterations easy, in the result he is responsible on the altered instrument. He applied to negotiable instruments generally the doctrine of *Young* v. *Grote* (2) as to a cheque between banker and customer. He then went on to inquire whether the acceptor was guilty of negligence in accepting the bill, and held that he was not. He referred to *Young* v. *Grote* (2), and said that a glance at the cheque there would have satisfied any careful person that it was in a state in which alteration was not merely a possible but a likely, result, and then said (3): "Here I cannot see anything to warrant such a finding. The unaltered bill was complete in form, and, upon inspection, would not, in my judgment, have excited suspicion in the mind of a reasonably prudent man." He therefore held that the acceptor was liable on the bill for 500*l.* and no more. He pointed out that the question whether the defendant had been guilty of such negligence as would impose upon him a liability for the subsequent forgery was a question, not of law, but of fact, referring particularly to the case of *Société Générale* v. *Metropolitan Bank*. (4) The defendant appealed, and in the Court of Appeal it was held by the majority, Lord Esher M.R. and Rigby L.J., that the acceptor of a bill incurs no such duty as Charles J. had found. As Lord Esher points out, it would be a very dangerous doctrine if a draft could be refused acceptance on the ground that there were spaces in it and the bill were to be protested in consequence. He said that *Young* v. *Grote* (2), which he characterized as "the fount of bad argument," had no application, as it was a question between banker and customer, and the person said to be negligent was the drawer of a cheque and not the acceptor of a bill of exchange. He added that the only ground on which *Young* v. *Grote* (2) could be supported was that the customer signed a blank cheque. As to

(1) [1906] A. C. 559.
(2) 4 Bing. 253.
(3) [1894] 2 Q. B. 665.
(4) 27 L. T. 849.

H. L. (E.)
1918
LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.
Lord Finlay L.C.

the finding by Charles J. on the question of negligence, Lord Esher says (1): "Suppose, however, there were a duty owing by the acceptor, it must be a duty not to accept the bill in such a form as to render a forged interpolation easy. The suggested neglect of that duty is that the acceptor ought to have anticipated that the bill would fall into the hands of a felonious person who might take advantage of the spaces, and that the acceptor should on that anticipation have put marks on the bill to fill up the spaces. Unless it can be laid down that the mere fact of leaving such spaces unfilled is conclusive evidence of negligence, it might be that on a similar state of things different juries might take different views. That, again, would be a dangerous state of things. If, however, it is a question of fact for our decision, I am of opinion that such evidence as was given in this case is no evidence of negligence." And he added that even if there was negligence, it was not the negligence, but the subsequent forgery, which was the immediate cause of the loss. Rigby L.J., on the question of negligence, said that it was probable that the drawer had used some means to close the defendant's eyes to the imperfections of the bill, and added (2): "The state of the evidence makes it impossible, in my view, to say that the plaintiff has proved negligence." Lopes L.J. differed, holding that the duty existed and that there had been negligence, so that the plaintiff was, in his opinion, entitled to recover on the bill altered to 3500*l.*

It is obvious that the position of the acceptor of a bill of exchange with reference to subsequent holders is very different from that of a customer with reference to his banker in the case of a cheque. In the latter case there is a definite contractual relation involving the obligation to take reasonable precautions.

When *Scholfield's Case* came to the House of Lords (3) Lord Halsbury said of *Young* v. *Grote* (4): "That case has been pushed so far in argument that I think the time has come when it would be desirable for your Lordships to deal with it authoritatively, and to examine how far it ought to be quoted as an authority for anything." And towards the close of his judgment Lord Halsbury refers to *Adelphi Bank* v. *Edwards* (5), a case as to a bill of

(1) [1895] 1 Q. B. 542-3.
(2) Ibid. 553.
(3) [1896] A. C. 514, 522.
(4) 4 Bing. 253.
(5) Unreported.

exchange, and goes on to say (1): "I entirely concur with what Lindley L.J. said in that case, that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it; and the wider proposition of Bovill C.J. in a former case, *Société Générale* v. *Metropolitan Bank* (2), that people are not supposed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land."

The distinction between *Young* v. *Grote* (3) and such a case as *Scholfield's* (4) was clearly pointed out by five of the peers who took part in the decision.

Lord Watson says (5): "In my opinion, *Young* v. *Grote* (3) can have no bearing upon the present case, if it was decided upon the ground that the customer, by signing a blank cheque, had given implied authority to fill it up to any subsequent holder. Whoever signs a cheque or accepts a bill in blank, and then puts it into circulation, must necessarily intend that either the person to whom he gives it, or some future holder, shall fill up the blank which he has left. No such inference would be reasonable in the case where the drawer or acceptor signs for a particular sum specified on the face of the document. If, on the other hand, the decision in *Young* v. *Grote* (3) was based upon the ratio that the customer, in filling up the cheque through his wife, whom he had constituted his agent for that purpose, had failed in the duty which he owed to his banker by giving facilities for its fraudulent alteration, I am not prepared to affirm that it cannot be supported by authority. But it does not, in my opinion, necessarily follow that the same rule must be applied between the acceptor of a bill of exchange and a holder acquiring right to it after acceptance. The duty of the customer arises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future indorsees of a bill of exchange. The duty which the appellant's argument assigns to an acceptor is towards the public, or what is much the same thing, towards those members of the public who may

(1) [1896] A. C. 532.
(2) 27 L. T. 849, 856.
(3) 4 Bing. 253.
(4) [1896] A. C. 514.
(5) Ibid. 536, 537.

H. L. (E.) 1918 LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR. Lord Finlay L.C.

happen to acquire right to the bill, after it has been criminally tampered with. Apart from authority, I do not think the imposition of such a duty can be justified on sound legal principle." He then reviews the authorities and shows that they lead to the same conclusion, and goes on (1): "The doctrine of Pothier, out of which the contention of the bill-holder in this and previous litigations has grown, is founded upon reasons which have no application to any question between a drawer or acceptor and a holder acquiring right to the bill after acceptance; and I know of no principle of law which would warrant its extension to that case."

Lord Macnaghten (2) says that on no view of *Young* v. *Grote* (3) could it apply to such a case as that before the House, and "Whatever may be the better ground for supporting the decision in *Young* v. *Grote* (3), it is obvious, on referring to the report in Bingham, that the Court went very much on the authority of the doctrine laid down by Pothier, that in cases of mandate generally, and particularly in the case of banker and customer, if the person who receives the mandate is misled through the fault of the person who gives it, the loss must fall exclusively on the giver. That is not unreasonable; but the doctrine has no application to the present case. There is no mandate as between the acceptor of a bill and a subsequent holder."

Lord Morris says that in *Young* v. *Grote* (3) the document was in blank, and adds (4): "Even if well decided on its particular facts, and a case between banker and customer, I fail to see how it governs this case, where the defendant accepted a regularly filled-up bill."

Lord Shand says (5): "As to the case of *Young* v. *Grote* (3), I find nothing in the grounds of the judgment which supports the proposition that an indorsee of a bill of exchange for value has a legal claim against the acceptor, against whom no want of bona fides can be alleged, for a sum beyond the amount for which the acceptance was given, on the ground of negligence in his having given his acceptance to a bill in such a form and impressed with such a stamp as enabled the drawer to commit a forgery by enlarging the amount for which the acceptanee was granted in such a way as to escape

(1) [1896] A. C. 542.
(2) Ibid. 544-6.
(3) 4 Bing. 253.
(4) [1896] A. C. 547.
(5) Ibid. 548.

detection by the indorsee." He then goes on to point out that on neither of the two grounds (negligence and signature of the cheques in blank) on which *Young* v. *Grote* (1) had been supported could it have application to the facts of the case under discussion.

Lord Davey expresses his entire agreement with Lord Watson's judgment, and says (2): "I only desire to say that in my opinion our judgment in this case is outside the case of *Young* v. *Grote*. (1) The doctrine of that case was one arising out of the relation of mandant and mandatory, which does not exist in the case of the acceptor and holder of a bill of exchange."

The decision of the House of Lords in the *Scholfield Case* (3) therefore proceeded on the ground that the duty which *Young* v. *Grote* (1) affirmed to exist as between banker and customer had no relation to any supposed duty on the part of the acceptor of a bill of exchange to those into whose possession the bill might pass. The decision of the House of Lords does not infringe upon the authority of *Young* v. *Grote*. (1) On the contrary, I think it recognizes it.

The last case which it is necessary to notice is that of *Colonial Bank of Australasia* v. *Marshall* (4), which, though not binding on any English Court, commands the most respectful consideration. This was an Australian case in which Marshall, Day, and one Myers were executors, and, as such, opened an account with the Colonial Bank on which cheques were to be drawn signed by the three. The cheques were drawn by Myers, who sent them for signature to Marshall and Day, and then added his own signature. Five cheques for small amounts were drawn by Myers and signed by Marshall and Day. Myers, before signing himself, added words and figures in the cheques as signed by Marshall and Day, and in this way greatly increased the apparent amounts of the cheques. Having signed the cheques himself, he got them cashed for the increased amounts. The question was whether Marshall and Day could throw the loss on the bank. In the judgment of the Judicial Committee (Lord Halsbury, Lord Macnaghten, Sir Arthur Wilson and Sir Alfred Wills) delivered by Sir Arthur Wilson, it is said (5) that *Scholfield* v. *Earl of Londesborough* (3), in the House of Lords, is now the

(1) 4 Bing. 253.
(2) [1896] A. C. 549, 550.
(3) [1896] A. C. 514.
(4) [1906] A. C. 559.
(5) Ibid. 565.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

Lord Finlay L.C.

governing authority, and, after stating the course of that case before Charles J., it is pointed out that the Court of Appeal negatived the existence of the alleged duty and the allegation that, assuming it existed, there had been a violation of it, so that both propositions were before the House of Lords. Sir Arthur Wilson says (1) that the existence of the duty was negatived by the House of Lords, but that that did not affect the case then under appeal, as it was recognized that there is, or may be, a duty on the part of a drawer of a cheque towards his banker which does not exist on the part of the acceptor of a bill towards holders. He said that no attempt was made to define the extent of such obligation and that it might be impossible to do so, as the extent of the duty might depend on the course of dealing between the parties. The judgment then proceeds as follows: " But the duty which, according to the ruling of the learned Chief Justice, subsists between customer and banker is substantially the same as that contended for in *Scholfield* v. *Earl of Londesborough* (2) as existing between the acceptor and the holder of a bill. And, as has been pointed out, the House of Lords had before them, on the appeal, the question whether the Court of Appeal was right in ruling that the facts found in that case (which included everything existing in the present case) did not amount to a breach of the obligation, supposing that obligation to exist. Not one of the members of their Lordships' House appears to have expressed the slightest disapproval of that ruling, and most of their Lordships distinctly approved of it. The Lord Chancellor expressed his concurrence in the opinion of Lindley L.J. ' that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it ; and the wider proposition of Bovill C.J. in a former case, *Société Générale* v. *Metropolitan Bank* (3), that people are not supposed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land.' Lord Watson approved the same rulings. Lord Macnaghten expressed the same opinion, and Lord Davey concurred in the judgment of Lord Watson. The principles there laid down appear to their Lordships to warrant the proposition that, whatever the duty of a

(1) [1906] A. C. 567. (2) [1896] A. C. 514.
(3) 27 L. T. 849, 856.

customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilize them for the purpose of forgery is not by itself any violation of that obligation. Their Lordships therefore agree with the High Court of Australia in holding that there was no evidence proper to be left to the jury of negligence on the part of the respondents."

The reasoning of the whole of this passage in the judgment in *Colonial Bank of Australasia* v. *Marshall* (1) rests on the assumption that the standard as to negligence, applicable in the case of banker and customer, is the same as that which would be applicable in the case of the acceptor of a negotiable instrument if the duty to take care existed. It is, of course, difficult to define the extent of a duty, where no duty at all exists, as is the case with the acceptor of a bill and subsequent holders. But on the hypothesis that there is some obligation to exercise care in the case of an acceptor of a bill, as well as in the case of a customer with regard to his cheque, the facts which would constitute negligence would be very different in the two cases. Charles J., while finding the existence of the duty in *Scholfield's Case* (2), held that there had been no negligence, while he fully recognized the doctrine of *Young* v. *Grote* (3) as to banker and customer, where the negligence of leaving blank spaces in drawing a cheque is pointed out. The questions are essentially different. As pointed out by Lord Esher in *Scholfield's Case* (2), the consequences of refusing acceptance of a draft because there were blank spaces in it might be serious, and all this must be taken into account in determining whether in such a case the acceptance was given negligently as regards the supposed liability to subsequent holders. On the other hand, in the case of banker and customer, the manner in which the cheque is to be filled up is entirely in the hands of the customer, and if he leaves unusual blank spaces which facilitate forgery, according to *Young* v. *Grote* (3), and on principle, there is negligence as between him and the banker. The passages cited by Sir Arthur Wilson from the judgments in *Scholfield's Case* (2) are rather directed to the negation of the existence of any duty as between the acceptor of a bill of exchange and holders. Without

(1) [1906] A. C. 559. (2) [1896] A. C. 514.
(3) 4 Bing. 253.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

Lord Finlay L.C.

the existence of duty to take care there can be no negligence, and what was settled by *Scholfield's Case* (1) is that no such duty exists as between acceptor and holders of a bill. With the greatest respect, I do not think that these passages support the proposition that as between banker and customer there is no negligence in drawing a cheque with blank spaces which facilitate forgery. Indeed, such an interpretation of these passages is inconsistent with the manner in which *Young* v. *Grote* (2) is treated by five out of the six peers who took part in the decision of *Scholfield's Case.* (1) The dictum of Lindley L.J. in the *Adelphi Bank Case* (3), which is cited by Lord Halsbury, was laid down in a case in which the liability of the acceptor to holders was in question, not on a case of banker and customer, and the same observation applies to the judgment of Bovill C.J. in *Société Générale* v. *Metropolitan Bank.* (4) In the course of his judgment Bovill C.J. is at pains to point out that the circumstances of *Young* v. *Grote* (2) were entirely different from those of the case before him, where there was simply a blank in the printed form of the bill of exchange.

The question whether there was negligence as between banker and customer is a question of fact in each particular case, and can be decided only on a view of the cheque as issued by the drawer, with the help of any evidence available as to the course of dealings between the parties or otherwise. If the existence in a cheque of blank spaces of an unusual nature and such as to facilitate interpolation is declared to be no evidence of a breach of duty as between customer and banker, the duty would have little left to operate upon. To recognize the duty of care by the customer in drawing cheques and then to lay down as a matter of law that there is no breach of that duty by leaving such blank spaces in the cheque is in effect to eviscerate the duty.

If *Young* v. *Grote* (2) is right, the judgment now appealed from is wrong. In my opinion, the decision in *Young* v. *Grote* (2) is sound in principle and supported by a great preponderance of authority, and must be treated as good law.

The ground on which *Young* v. *Grote* (2) proceeded was, according to the judgment of three out of the four judges, simply this, that if a

(1) [1896] A. C. 514.
(2) 4 Bing. 253.
(3) Unreported.
(4) 27 L. T. 849, 856.

customer in drawing a cheque neglects reasonable precautions against forgery and forgery ensues, he is liable to make good the loss to the banker, and that the fact that a crime has to intervene to cause the loss does not make it too remote. Indeed, forgery is the very thing against which the customer is bound to take reasonable precaution. Leaving blank spaces in the cheque is the commonest way in which forgery is facilitated, and to lay down as a matter of law that it is no breach of duty would be a somewhat startling conclusion. In *Young* v. *Grote* (1) there was the additional circumstance of the small " f " at the beginning of the word " fifty," but I cannot doubt that without this the result would have been the same.

In the present case the customer neglected all precautions. He signed the cheque, leaving entirely blank the space where the amount should have been stated in words, and where it should have been stated in figures there was only the figure " 2 " with blank spaces on either side of it. In my judgment, there was a clear breach of the duty which the customer owed to the banker. It is true that the customer implicitly trusted the clerk to whom he handed the document in this state to fill it up and to collect the amount, but his confidence in the clerk cannot excuse his neglect of his duty to the banker to use ordinary care as to the manner in which the cheque was drawn. He owes that duty to the banker as regards the cheque, and it is no excuse for neglecting it that he had absolute and, as it turned out, unfounded confidence in the clerk. The duty is not a duty to have clerks whom the customer believes to be honest. It is a specific duty as to the preparation of the order upon the banker. If the customer chooses to dispense with ordinary precautions because he has complete faith in his clerk's honesty, he cannot claim to throw upon the banker the loss which results. No one can be certain of preventing forgery, but it is a very simple thing in drawing a cheque to take reasonable and ordinary precautions against forgery. If owing to the neglect of such precautions it is put into the power of any dishonest person to increase the amount by forgery, the customer must bear the loss as between himself and the banker.

But, further, it is well-settled law that if a customer signs a cheque in blank and leaves it to a clerk or other person to fill it up, he is bound by the instrument as filled up by his agent. This has been

(1) 4 Bing. 253.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

Lord Finlay L.C.

suggested as the real ground for the decision in *Young* v. *Grote*. (1) For the reasons which I have already stated, I do not think that on the facts of that case it is the true ground of the decision. But the principle is thoroughly established, and it seems to me to apply to the facts of the present case. The customer signed the cheque in the condition which I have described and handed it over to the clerk to be filled up by him. For all practical purposes the cheque was in blank, as the figure "2" in its isolated position afforded no security whatever against a fraudulent increase. The clerk had the authority of the customer to fill up the words denoting the amount in the body of the cheque, and to put other figures before and after the "2" was quite easy owing to its position. The examination of the facsimile of the cheque when filled up shows how impossible it was to detect the fraud. On such facts the customer is liable for the act of the clerk just as much as if the cheque had been completely in blank when he signed it and handed it to the clerk to fill it up. There was no apparent limitation on the authority of the clerk in filling up the cheque. On this ground, also, which on my view of *Young* v. *Grote* (1) is independent of that decision, I am of opinion that this appeal should be allowed.

For these reasons I think that judgment should be entered for the bank with costs here and below.

VISCOUNT HALDANE. My Lords, the respondents, who are in partnership as general merchants, at the time of the transaction in question were customers of the appellant bank. They employed as their clerk one Klaentschi, who was their book-keeper and cashier, and who, amongst other duties which he discharged, used at times to fill in cheques for them for signature. In the forenoon of February 9, 1915, Mr. Arthur Doluchanjanz, one of the respondent partners, was going out of his office to luncheon. He appears to have been in a hurry, and to have had his hat already on, when Klaentschi called him back and said that he wanted him to sign a cheque for petty cash for the firm. Klaentschi brought him a loose cheque torn out of the cheque-book and without the counterfoil. Mr. Doluchanjanz appears from his own account to have taken a pen which Klaentschi handed to him, and to have signed

(1) 4 Bing. 253.

the cheque without further consideration. He only remarked that he did not like signing with Klaentschi's pen, and that he wished he would bring cheques to his private office in future. He, however, signed the firm name to this one, with the observation that the cheque was for 2*l.* and that usually Klaentschi asked for 3*l.* for petty cash. The latter replied that the amount was enough.

My Lords, the cheque was not completely filled in when the partner signed it. It was already dated and made payable to "ourselves or bearer." But, as Sankey J., who tried the case, found, no words at all had been inserted in the space provided for the indication in words of the amount, and in the space provided for figures there was a "2," with room in which other figures could be inserted on each side of this figure. After Mr. Arthur Doluchanjanz had left the office Klaentschi proceeded to fill in the cheque thus left incomplete. His employer had without doubt authorized him to fill it in so as to be a complete cheque for 2*l.* and then to take it to the bank and cash it. But he inserted "one hundred and twenty" pounds in the space provided for words, and he further inserted a "1" to the left and a "0" to the right of the "2" in the space where the latter figure was written, making a corresponding amount in figures of 120*l.* He subsequently took the cheque to the bank, obtained cash for it over the counter, and almost immediately afterwards absconded.

There were other cheques as to which questions were raised by the respondents, but these questions have all been disposed of. The only thing that remains in controversy is whether the respondents were entitled to succeed in an action which they brought to have it declared that the bank were not entitled to debit the respondents' account with more than 2*l.* in respect of the cheque I have described, or alternatively that the respondents were entitled to 118*l.* as damages. Sankey J. decided in favour of the respondents, and the Court of Appeal has affirmed this decision.

My Lords, the question before us is whether the Courts below, in dealing with the facts found as I have stated them, came to a true conclusion as to what ought to result from them in law. In order to consider the proper conclusion it is necessary to ascertain what relevant principles have been established. The decided cases in point have been fully brought before your Lordships in the able

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

Viscount Haldane.

arguments to which we have listened from the Bar. After considering the authorities, I do not, speaking for myself, entertain any doubt that certain important principles have at length been placed beyond controversy.

Ever since this House in 1848 decided *Foley* v. *Hill* (1) it has been quite clear that the relation between a banker and the customer whose balance he keeps is under ordinary circumstances one simply of debtor and creditor. But in other judgments, and notably by a later decision of this House, *Scholfield* v. *Earl of Londesborough* (2), it was made equally clear that along with this relation and consistently with it there may subsist a second one. This further relation, and the duties which arise out of it, differentiate the additional relation between the customer who draws a cheque on his banker from any relation which exists between the parties to an ordinary negotiable instrument, between, for example, the acceptor of a bill of exchange and the person who buys it in the market in reliance on his signature. The acceptor of a bill of exchange may well be under the general obligation which affects persons who invite others to act upon their undertakings given for valuable consideration not to express these undertakings in such a form as may naturally mislead those who act upon them. But the customer of a bank is under a yet more specific duty. The banker contracts to act as his mandatory and is bound to honour his cheques without any delay to the extent of the balance standing to his credit. The customer contracts reciprocally that in drawing his cheques on the banker he will draw them in such a form as will enable the banker to fulfil his obligation, and therefore in a form that is clear and free from ambiguity. The correlative obligation is thus complementary to the obligation of the mandatory to apply the balance in paying without delay the cheques as and when presented to him. It may be that, if the cheque is completely and distinctly drawn, the mere fact that so much space has been left between the words and the figures on the one hand and the marginal limits provided by the blank form on the other as to have enabled a skilful forger to commit a crime by altering the amounts is not, if that be all, a breach of the obligation of the customer. People are not called on to anticipate the commission of forgery when they are exercising ordinary care

(1) (1848) 2 H. L. C. 28. (2) [1896] A. C. 514.

in writing their cheques. To have left such spaces, if there is nothing more, may not bring the case within the category of those in which the customer is deemed to have failed in his duty to his banker. At all events the Judicial Committee of the Privy Council said so in *Colonial Bank of Australasia* v. *Marshall* (1), and I do not think that in order to dispose of the present appeal it is necessary to discuss the question how far what was said in that case binds us sitting here, or what authority should be attributed to the judgment.

What I wish to make plain is that in the case of a cheque drawn by a customer on his banker there is a special duty to exercise care in the framing of what is a mandate, a special duty which does not exist in the same fashion in the instance of the acceptor of a bill of exchange, where the instrument is drawn for circulation among the members of the public generally, and is not a direction to a designated person to pay out of a balance for which he has to account, a person who has a right to insist that the direction he receives to be acted on without any delay shall be so drawn as not to require exceptional consideration and so impose delay. The obligation of the customer to avoid negligence in this regard was, I think, well expressed by Kennedy J. in *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (2) when that very accomplished judge defined it as including a "duty to be careful not to facilitate any fraud which, when it has been perpetrated, is seen to have, in fact, flowed in natural and uninterrupted sequence from the negligent act." The limitation of the liability to that which flows directly from the act established as negligent was obviously introduced by Kennedy J. because of what has been repeatedly laid down in the decided cases as essential, that the negligence should be of such a kind that the loss has resulted immediately from it, and not from some intervening cause which, although it was able to produce its effect because of what the customer had previously done or omitted to do, was not itself brought into existence as the immediate and natural outcome of his action. Thus a man may be imprudent in leaving his cheque-book and pass-book in the hands of his clerk, who is thereby enabled to forge a cheque. But he is not liable, for this reason, that the direct and real

(1) [1906] A. C. 559. (2) 11 Com. Cas. 255, 266.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

Viscount Haldane.

cause of the loss is the intervention of an act of wickedness on the part of the clerk, which the law does not call on him to anticipate in the absence of obvious ground for suspicion. In *Kepitigalla Rubber Estates* v. *National Bank of India* (1) Bray J. states the principle with conspicuous lucidity.

My Lords, a cheque is a bill of exchange within the definition in the Bills of Exchange Act, 1882. The statement in a cheque of the sum payable as expressed in words is therefore, in accordance with s. 9 of that Act, instructive, inasmuch as in the case of a discrepancy the statement in words is to prevail over that in figures. Although a bill of exchange is a complete order for payment within the definition in s. 3, even if the sum payable is stated in figures only, yet it may be that a banker would be justified in refusing to pay a cheque in which a statement in words had been omitted from the space provided for it. For, as I have observed above, the banker as a mandatory has a right to insist on having his mandate in a form which does not leave room for misgiving as to what he is called on to do, and there is nothing in the Act which in any way abrogates this right if by usage between himself and his customer he is entitled to expect the amount to appear in writing as well as in figures. The point does not, however, arise for decision in the present case. The statute also declares the law on another point which is not without bearing on the question before us. Sect. 20, sub-s. 1, enacts that " where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer or the acceptor or an indorser ; and in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit." By sub-s. 2 of the same section, " In order that any instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time and strictly in accordance with the authority given." My Lords, these words probably do no more than express the law merchant as it stood prior to the statute. And they leave open for determination

(1) [1909] 2 K. B. 1010.

by the law outside the statute the question how the authority given is to be proved. I think that a banker has more than one answer to his customer if he is challenged for paying a cheque which on the face of it appears to have been duly filled in before signature, although in fact it has really been filled in subsequently and otherwise than in accordance with instructions given by the customer to his clerk when he signed it and handed it to the latter to complete and cash with a restriction on the clerk's authority of which the banker knew nothing. If the customer objects to be debited with the amount of such a cheque on the ground that the clerk has inserted an amount which was not authorized, the banker may reply either of two things. He may say that the customer was under a legal obligation to see that any cheque which he signed, in order that it might subsequently be filled in and presented, was in order when presented, and that the existence of this obligation precludes him from setting up that the clerk had not authority in fact. The presentation at the counter of a cheque for a definite amount, which he authorized to be presented in order to be cashed, although he actually intended that it should be cashed for a different amount, is a representation that the bearer presenting it has authority to receive payment. The special duty of the customer towards his banker to which I have already referred is, in itself, a sufficient ground for attributing an intention to make such a representation, and I think that its inference may also be justified on the more general principle of estoppel by conduct enunciated by Parke B. in the well-known case of *Freeman* v. *Cooke* (1), explained in this connection by Blackburn J. in the Exchequer Chamber in *Swan* v. *North British Australasian Co.* (2) In *Freeman* v. *Cooke* (1) Parke B. points out the difference between estoppel by record or by deed, as to which the rules of pleading, which do not favour it, are strict, and estoppel in pais, which is, generally speaking, a mere application not of any technical rule, but of common sense. He quotes *Pickard* v. *Sears* (3) for the proposition that when a man by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is precluded from

(1) (1848) 2 Ex. 654, 663. (2) 2 H. & C. 175.
(3) (1837) 6 Ad. & E. 469, 474.

H. L. (E.) 1918 LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR. Viscount Haldane.

averring against the latter a different state of things as existing at the same time. He explains that by "wilfully" is meant, not necessarily that the party represents that to be true which he knew to be untrue, but that at least he *meant* his representation to be acted on, and therefore that, whatever a man's real intention may be, if he so conducts himself that a reasonable person would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it, as true, the party making the representation would be precluded from contesting its truth. He goes on to add that conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to make known the facts accurately, may have the same effect.

My Lords, the principle laid down by Parke B. is one the recognition of which is essential to the conduct of business between the members of every well-ordered community. It is generally recognized in ordinary social life as imposing obligation of honour as much as of law. And it may be observed that it is hardly a rule of what is called substantive law in the sense of declaring an immediate right or claim. It is rather a rule of evidence, capable not the less on that account of affecting gravely substantive rights. The principle of estoppel thus explained is one which it appears plain that a banker, in proper circumstances, might invoke as a defence against his customer's claim.

I think, further, that the banker may alternatively say that even if the customer could otherwise prima facie be entitled to recover from him the amount paid on such a cheque as I have referred to, on the footing that the latter had no voucher which justified the payment, he, the banker, must be entitled in such a case to recover against the customer for the loss sustained by a negligent act, and that, to prevent circuity of action, he must be allowed to set up a defence based on his immunity from the loss so occasioned: see the judgment of Cockburn C.J. in the case of *Swan* v. *North British Australasian Co.* (1)

My Lords, the case of a customer drawing a cheque on a banker to whom he owes the duty referred to is different from that of, for example, an acceptor of a bill of exchange who has not such a special duty. And I should hesitate before saying that the proposition laid

(1) 2 H. & C. 175, 190.

down by Lord Halsbury in *Scholfield* v. *Earl of Londesborough* (1) in commenting on the unreported decision in *Adelphi Bank* v. *Edwards* (2) ought to be extended without qualification to a cheque drawn on a banker. Lord Halsbury cites with approval what Lindley L.J. laid down in the latter case to the effect that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it ; and also a wider proposition of Bovill C.J. in *Société Générale* v. *Metropolitan Bank* (3), that people are not supposed to commit forgery, and that the protection against forgery is, not the vigilance of parties excluding the possibility of committing forgery, but the law of the land. For the reasons which I have already given I think that, at all events, in the case of cheques drawn by a customer on his banker, this proposition cannot be applied without qualification by other principles which are plainly applicable. And even in regard to other kinds of negotiable instruments that must be remembered which was pointed out by Fletcher Moulton L.J. in *Smith* v. *Prosser* (4), that "if a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument." The decision of this House in *Brocklesby* v. *Temperance Building Society* (5) is a further illustration of the way in which the proposition of Lord Halsbury has to be taken as laying down only a general rule which is subject to qualification in special instances. There a father entrusted his son with title deeds for the purpose of raising a limited sum. The son, by fraudulent concealment of the written authority given to him and by means of forgery, succeeded in borrowing a larger sum on equitable mortgage by deposit of the deeds and appropriated it. It was held by Lord Herschell, Lord Watson, and Lord Macnaghten, following the well-known decision of Lord Cranworth in *Perry-Herrick* v. *Attwood* (6), that the father could not redeem the security without paying the lender all he had lent. The principle laid down by this House was that if a person permits title deeds to be dealt with for the purpose of creating a charge of

(1) [1896] A. C. 514, 532.
(2) Unreported.
(3) 27 L. T. 849, 856.
(4) [1907] 2 K. B. 735, 752.
(5) [1895] A. C. 173.
(6) (1857) 2 De G. & J. 21.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

Viscount Haldane.

definite amount, and the limit is exceeded, he cannot, as against an innocent third party who has advanced his money without notice of the limit, complain that the authority which he gave has been exceeded.

My Lords, no doubt this principle becomes applicable owing to the importance which the Court of Chancery always attached to the possession of title deeds, but it furnishes none the less a further illustration of the caution which is required before relying on the general proposition to which I have referred.

My Lords, I have come to the conclusion that if the principles which I have now stated are applied in the present case we cannot avoid the conclusion that the decision in the Courts below was erroneous. The respondents signed a cheque which was blank altogether as regards the words which according to usage were to be inserted to describe the amount, and as to the figure space was in such a condition that the figure "2" was inserted in a place where other figures could easily be added on each side. They left it to their clerk to fill up the cheque thus imperfect. It was drawn payable to bearer, and he was authorized to present it for payment. On the face of the cheque there was nothing of any kind to awaken any doubt in the minds of the officials of the bank that the cheque, which it was their duty to honour, if in order, without delay, was in order. The bank paid the amount which it appeared to be drawn for over the counter in cash to the fraudulent clerk. Both upon the principles and upon the authorities I have referred to, it seems to me that the bank acted rightly in law in so doing. It was said in the judgments in the Courts below that the insertion of the figure "2" in the cheque before signature was a limitation on the face of it of the authority of the clerk, and that therefore the real cause of the loss was not the failure to tell the bank of the restriction on his power, but his own fraud, for which the respondents were not liable. I cannot agree. So far as the bank was concerned, no limitation of the amount appeared on the face of the cheque when presented. Before signature there was that which, if left alone, would have been such a limitation. But then the respondents left the clerk in a position to make additions to the cheque, which was not only in an imperfect condition, but had the limiting figure in such a place that the clerk could, by merely adding figures on each side, make it

disappear as completely as if it had never been inserted. He did make additions which, when the cheque was presented at the bank, had rendered the original limiting figure for all practical purposes non-existent. It was immediately due to the action of the respondents, and not to any other cause, that he was able to do this, and I am of opinion that in putting as much as they did within his power they took the risk of failure in the discharge of their duty to the bank of which they were customers. It follows that they cannot now recover the amount of a loss which was due to their own negligence.

My Lords, much was said in the course of the discussion, both at the Bar and in the Courts below, about the case of *Young* v. *Grote*. (1) There the plaintiff, having occasion to leave home, signed a blank cheque and handed it to his wife with authority to fill it up for such sum as she might think requisite for the purposes of his business. She told a clerk to fill it up with the sum of 50*l*. 2*s*. 3*d*. He filled in that sum, and showed the cheque, so made out and payable to bearer, to the lady, who told him to get it cashed. The amount was inserted in words as well as figures, but the word "fifty" commenced in the middle of a line and had a small "f" and the figure "50" was inserted so far from the letter "£" as to permit another figure to be inserted in the interval. The clerk then fraudulently altered the words and figures by such insertions as made the cheque appear as one for 350*l*. 2*s*. 3*d*., and obtained payment from the defendants, the plaintiff's bankers. The latter claimed to debit the plaintiff with the larger amount, and the dispute which arose was referred to arbitration. The arbitrator found that the plaintiff had been negligent in causing his cheque to be handed to the clerk in such a state that he could, by the mere insertion of words, make it appear to be a cheque for the larger sum. He appears to have stated the facts in his award, and to have referred the question whether they imported a duty the breach of which amounted to negligence in law for the opinion of the Court of Common Pleas. That Court decided that the bankers were not liable for the loss sustained by the plaintiff. The case is a very well-known one, and has been frequently discussed. I think that the outcome has been a substantial balance of authority in support of the result

(1) 4 Bing. 253.

H. L. (E.) 1918 LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR. Viscount Haldane.

reached by the Court of Common Pleas. To me it appears that the conclusion come to by that Court was the right one. I think that the facts established were in some respects not so favourable to the bankers as those in the case now before us. The cheque as signed was complete, which is not the case here. But the small "f" in the word "fifty" was a feature of importance when taken in conjunction with the way in which the figure "50" was placed at a distance from the "£." There was also the finding of the arbitrator, which seems to have implied that he thought the plaintiff had been careless in his conduct. In these points the circumstances of the case differ from those in *Colonial Bank of Australasia* v. *Marshall* (1), to which I have referred earlier, and I see no reason for saying that the result reached by the Court of Common Pleas is inconsistent with the weight of subsequent authority.

But having gone so far, I wish to add that I doubt whether the case is to-day a particularly instructive one. The judges who decided it did so on grounds which varied. Best C.J. proceeded on that of negligence, and so did Grose J. But in the remaining judgments it is suggested as a sufficient ground that the plaintiff signed an authority to the bankers so general that it covered what was done by his wife and the fraudulent clerk in combination.

My Lords, I think that since *Young* v. *Grote* (2) was decided the principles on which questions of this kind ought to be disposed of have been rendered much clearer than they were made in the judgments of the Court of Common Pleas. While I have no quarrel with the particular decision in the case, I am therefore not disposed to rely on these judgments as containing any exposition of the law which is of much value to-day.

LORD SHAW OF DUNFERMLINE. (3) My Lords, the facts of this case are very simple, and they have been told by your Lordships who preceded me. The case is one between banker and customer. It is almost as important, in view of the large citation of authority which has been made in the Courts below and at the Bar, to keep in mind some things which are not part of this case as those things which are.

(1) [1906] A. C. 559. (2) 4 Bing. 253.
(3) Read by Lord Atkinson.

In the first place, not only is this not a case between the drawer and the acceptor of a bill or between the acceptor and a holder of the bill in due course, but it is not the analogue of such a case. The reason that I state this in the forefront of my opinion is that it disposes at once of a considerable body of authority which was cited as relevant to the consideration of the present suit. My Lords, the distinction between a case of the latter sort and of the present was very clearly brought out in *Scholfield* v. *Earl of Londesborough* (1) by Lord Watson and by Lord Davey. In the words of the former, which are directly applicable to the present case, "the duty of the customer arises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future endorsees of a bill of exchange."

In the next place, my Lords, on the facts before us themselves, the elements are of the simplest. It is the case of a customer drawing a cheque in his own favour from his banker. There is no complication as to the cheque having passed to a payee, third party, nor is there any question, accordingly, as to any conduct or misconduct on the part of such payee. The case is direct in that sense. Nor is there any question of the genuineness of the signature; it is admitted to be genuine. I state this elementary point because it disposes again of a considerable portion of the authorities cited to us in regard to forged cheques. A cheque with the signature of a customer forged is not the customer's mandate or order to pay. With regard to that cheque it does not fall within the relation of banker and customer. If the bank honours such a document not proceeding from its customer, it cannot make the customer answerable for the signature and issue of a document which he did not sign or issue; the banker paying accordingly has paid without authority and cannot charge the payment against a person who was a stranger to the transaction.

This was the ground stated by Lord Cranworth L.C. in *Orr & Barber* v. *Union Bank of Scotland* (2): "Payment on a forged cheque or order is not of itself any payment at all as between the party paying and the person whose name is forged. This is, I apprehend, the law both of England and Scotland."

(1) [1896] A. C. 514. (2) 1 Macq. 513, 522.

H. L. (E.) 1918 LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR. Lord Shaw of Dunfermline.

The case, then, must be taken as the simplest one, namely, of a cheque duly signed, forwarded on behalf of the customer to the banker, and honoured. My Lords, there are in these circumstanes reciprocal obligations. If the cheque do not contain on its face any reasonable occasion for suspicion as to the wording and figuring of its contents, the banker, under the contract of mandate which exists between him and his customer, is bound to pay. He dare not, without liability at law, fail in this obligation, and the consequences to both parties of the dishonour of a duly signed and ex facie valid cheque are serious and obvious. In the second place, if there be on the face of the cheque any reasonable ground for suspecting that it has been tampered with, then that in the usual case is met by the marking "refer to drawer," and by a delay in payment until that reference clears away the doubt. Always granted that the doubt was reasonable, the refusal to pay is warranted. These obligations on the banker do not, of course, exist until after the cheque has been presented.

Upon the other part there are obligations resting upon the customer. In the first place his cheque must be unambiguous and must be ex facie in such a condition as not to arouse any reasonable suspicion. But it follows from that that it is the duty of the customer, should his own business or other requirements prevent him from personally presenting it, to take care to frame and fill up his cheque in such a manner that when it passes out of his, the customer's, hands it will not be so left that before presentation, alterations, interpolations, &c., can be readily made upon it without giving reasonable ground for suspicion to the banker that they did not form part of the original body of the cheque when signed. To neglect this duty of carefulness is a negligence cognizable by law. The consequences of such negligence fall alone upon the party guilty of it, namely, the customer.

My Lords, it appears to me that a crucial consideration in a case such as the present is this, namely, what is the point of time at which these respective obligations meet. The point of time is the presentation of the cheque. Not until that moment is the banker confronted with any mandate or order, and in my opinion the responsibility for the cheque and all that has happened to it between its signature and its presentation is not, and ought not to be, laid

upon the banker. If at that moment three things are satisfied—namely, (1.) that the cheque is duly signed, (2.) that its appearance and statement of contents present no reasonable ground for suspicion, and (3.) there are customer's funds available—then the banker is bound to pay. But if a banker were bound to inquire in regard to every cheque with a genuine signature what had been the history of that cheque from the time that the customer lifted his pen from it until the time when it was presented at the bank, banking business would be greatly impeded or impossible ; and in my humble view it would be subjected to risks for which there is no foundation in legal principle.

It is entirely different, however, on the matter of this intervening period, with regard to the obligations of the customer. When a customer makes a cheque payable to himself or bearer it is entirely at his option when to present it. The responsibility for what occurs between signature and presentation, a period in his control, lies entirely with him. If, as in the present case, he gives it to a clerk, who tampers with it in such a way that no man of ordinary skill can find the roguery out, there does not seem to me to be any foundation in law for discharging the customer from the responsibility for these events or for laying them upon the banker, who was in no sort of position either of control over or participation in them.

It may be true—it is true in this case—that what happened in the meantime to increase the nominal value of the cheque and to deceive all parties was a crime. But it was a crime brought about during this period of the customer's responsibility, and, as frequently happens in such cases, the crime of the customer's own servant. Accordingly the condition of the cheque has been altered, not only during the period of the customer's responsibility, but by the act of some person with whom he had left the document in charge. If it is suggested that this is a hardship upon the customer (abating for the moment the obvious consideration that it is a still harder one for the banker), the answer in the general case is obvious, namely, that it is part of the customer's duty to fill up his cheque in such a way as to prevent roguery being made easy.

My Lords, I do not here pronounce any judgment upon another type of case which may be figured. I refer to a case in which there has been no negligence on the part of the customer in the respect

H. L. (E.)
1918
LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.
Lord Shaw of Dunfermline.

last alluded to, but in which erasures of great skill or deletions, say accomplished by chemical aid, have been made upon a cheque so as to undo all the care properly exercised by the customer in regard to its contents. Yet I cannot conceal from your Lordships that I should have the greatest doubt as to whether—this kind of roguery having been practised during that period of responsibility on the part of the customer to which I have referred—the customer would not also be liable. But the present, my Lords, is not a case of that kind. It is a case of negligence. And it is necessary to state again that in which the negligence consists.

The negligence consists in the breach of a duty owing by the customer to the banker. That duty is so to fill up his cheque as that when it leaves his hands a signed document it shall be properly and fully filled up, so that tampering with its contents or filling in a sum different from what the customer meant it to cover shall be prevented.

My Lords, this is the sole ratio of the blank cheque decisions. The customer in such cases is bound to accept the responsibility for whatever the contents of the cheque may be, if he has allowed a cheque to pass out of his hands blank. The present case was upon its facts a very near approach to that of a blank cheque ; a figure " 2 " was upon it with space before and behind it which easily permitted the " 2 " being turned into " 120." As for the words of the cheque, these were wholly blank, and the clerk to whom it was entrusted filled in the words " one hundred and twenty pounds." In that condition it was presented to the bank and honoured. I ask myself : so far as the banker was concerned, what difference did it make to his obligation to pay that between the time when his customer signed it and his customer's servant presented it the servant had filled up that cheque from being a blank to what it was, or from being a cheque with a figure " 2 " to what it was ? And I ask myself with regard to the customer : what difference does it make in principle that the cheque is left by him entirely blank, or is left so blank that the contents finally appearing on it may so appear without arousing the slightest suspicion ? There is a suggestion in some of the judgments below that the limitation of the authority to the clerk was a limitation to 2*l.* because of the isolated figure " 2." That was a limitation of authority only indicated to the clerk, and

no care was taken that such a limitation of authority should reach the knowledge of the banker. So that in truth, my Lords, for all practical purposes and so far as the banker was concerned, the same limitation of authority could have been pleaded although the figure "2" had not been inserted, and that by simply establishing that the clerk knew perfectly well that it was to be 2*l.* and nothing more. The roguery would have been little more and little different than it was whether the cheque had been entirely blank or with the figure "2" placed where it stood. It does not appear to me that on principle the duty of properly and fully filling up the cheque is met by what was done in the present case.

It is no doubt true that had the cheque been presented as signed it might have been honoured without impropriety, but when a cheque is not presented as signed, and has been tampered with before presentation, the question as to whether the customer has been negligent in a duty that lay upon him of so filling up his cheque as to prevent such tampering, if answered in the affirmative, absolves the banker if the latter has paid on an ex facie unsuspicious document.

My Lords, I had intended to go over in detail the authorities from *Young* v. *Grote* (1) downwards; but this is unnecessary, and I think it would be presumptuous in me to do so after the full treatment thereof by my noble and learned friend on the woolsack. I express my entire agreement with his Lordship's narrative and conclusions upon that subject.

In particular I desire to say that I think the case of *Young* v. *Grote* (1) was rightly decided. I may further indicate my view that many subsequent decisions which have referred to it have introduced a certain embarrassment into this portion of our law, not because of what was said in *Young* v. *Grote* (1) itself, but of what later judges, even while approving the decision, thought must have underlain it. Not a word is said, for instance, in *Young* v. *Grote* (1) about estoppel. It may be that some such doctrine was in the judges' minds in deciding it. I am not enough of a psychological expert to say. It is enough for me, agreeing as I do entirely with the result of the decision, to observe that I think it safest to place the case upon the grounds on which the judges themselves put it.

(1) 4 Bing. 253.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

Lord Shaw of Dunfermline

It was treated by them as a case of negligence. As Best C.J. said, "We decide here on the ground that the bank has been misled by want of proper caution on the part of his customer." Park J. concurred with the arbitrator on the fact of negligence. "Great negligence" was the reason assigned by Gaselee J. And, said Burrough J., "the blame is all on one side." My Lords, that was the ground of judgment. I do not think it expedient to speculate upon anything deeper than or different from that, and, as I say, I think the course of the law has been disturbed by speculations of that order. It is true that Best C.J. founded upon certain sentences of Pothier, but these sentences, my Lords, seem, like *Young* v. *Grote* (1) itself, to be perfectly apposite to the present case and to be entirely sound. They are these: "Cependant, si c'était par la faute du tireur que le banquier eût été induit en erreur, le tireur n'ayant pas eu le soin d'écrire sa lettre de manière à prévenir les falsifications, *putà*, s'il avait écrit en chiffres la somme tirée par la lettre, et qu'on eût ajouté zéro, le tireur serait, en ce cas, tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre, à laquelle le tireur, par sa faute, a donné lieu." I think this sentence of Pothier's may be held as a plainly sound statement of the law of England and Scotland on the subject in the present day.

Young v. *Grote* (1) has been approved by a preponderating body of decisions, and in the highest quarters, since its date. I beg to say, my Lords, however, that I express no surprise that great difficulty was felt upon this topic in the Courts below. That difficulty is caused for two reasons. The first I have already alluded to, namely, the speculations made in subsequent cases as to what underlay or was supposed to underlie that judgment. Alongside of these explorations among *arrière pensées*, it is consoling to be able to place the few simple sentences in which the judges in *Young* v. *Grote* (1) pronounced their own opinions. There was also a certain note of invitation to review in the language used by Lord Halsbury in *Scholfield's Case* (2), although it has to be borne in mind that the learned Lord's doubts and queries were answered in the case itself by the other four learned Lords who sat with him.

A very substantial difficulty, however, has been caused by the

(1) 4 Bing. 253. (2) [1896] A. C. 514.

case of *Colonial Bank of Australasia* v. *Marshall* (1), to which great respect has to be paid. My Lords, in that case, as the judgment of Sir Arthur Wilson undoubtedly shows, the crux of the decision was the opinion expressed in these words—namely, that the duty which "subsists between customer and bank is substantially the same as that contended for in *Scholfield* v. *Earl of Londesborough* (2) as existing between the acceptor and the holder of a bill." My Lords, in my opinion this was erroneous, and I illustrate the error not only by the passage from Lord Watson already quoted, but by the following citation from Lord Macnaghten. (3) Referring to the report in Bingham, he says "the Court went very much on the authority of the doctrine laid down by Pothier that in cases of mandate generally, and particularly in the case of banker and customer, if the person who receives the mandate is misled through the fault of the person who gives it, the loss must fall exclusively on the giver. That is not unreasonable; but the doctrine has no application to the present case. There is no mandate as between the acceptor of a bill and a subsequent holder." I humbly think the case of *Marshall* (1) to be in conflict with the great and binding authority of *Scholfield* (2), and I do not see my way to follow it.

I agree with the motion proposed from the woolsack.

LORD PARMOOR. My Lords, it is not necessary to restate the facts.

Two points arise for decision: (1.) What was the mandate which the customer sent to his banker? (2.) Was there a breach of the duty which a customer owes to his banker in the preparation and issuing of a cheque on an ordinary cheque form, and, if so, did such breach of duty directly conduce to the payment which the appellants claim to debit against the account of the respondents? Sankey J. decided in favour of the respondents on both points, and his decision was unanimously upheld in the Court of Appeal.

The decision of the appeal depends upon the special relationship of a customer and banker. No doubt assistance may be obtained from cases which have arisen as between a holder, who is not the drawer, and an acceptor of a bill of exchange, but in that case

(1) [1906] A. C. 559, 567. (2) [1896] A. C. 514.
(3) [1896] A. C. 545.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

Lord Parmoor.

there is no contractual relationship between the parties such as exists between a customer and a banker. The relationship between a customer and a banker is that of creditor and debtor: *Foley* v. *Hill.* (1) The relationship implies, however, a special duty on the customer to use due caution in the preparation and issue of a mandate to his banker requiring him to make a payment as his mandatory to the debit of his account. In ordinary business the customer issues his mandate as a cheque on a cheque form which contains two spaces, one for stating the sum which he desires his banker to pay on his behalf in words, and another for stating the sum in figures. If the cheque is presented for payment in proper form, there is a prima facie obligation on the banker to pay the sum inserted in words and figures, and he has a corresponding right to debit this sum to the account of his customer. The risk of paying a forged mandate ordinarily rests upon the banker, but there are exceptional instances in which a banker is entitled to charge the account of his customer, although the amount has been paid by him on a forged document.

The first principle on which the appellants rely is that the respondents entrusted to their clerk an authority to fill up the cheque under such conditions that they are responsible for the amount fraudulently inserted, and are precluded from showing that the authority of the clerk was limited by instructions, since such limitation was not apparent on the face of the document and had not been communicated to them in any way. It would, I think, make no difference whether the action of the clerk was due to carelessness or fraud. This principle has been variously traced to the law merchant, or to the common law doctrine of estoppel, but the importance lies not so much in the origin of the principle as in the nature of the conditions under which it is applicable. The cases show that these conditions can be inquired into—*Lloyd's Bank* v. *Cooke* (2) and *Smith* v. *Prosser.* (3)

What, then, are the conditions in the present case? If the respondents had signed a cheque in blank, leaving it to be filled up by the clerk, and the clerk had carelessly or fraudulently filled it up in excess of the amount of his authority, the appellants would

(1) 2 H. L. C. 28. (2) [1907] 1 K. B. 794.
(3) [1907] 2 K. B. 735.

have been entitled to debit the amount to the account of the respondents. It is well established that in such a case it would not have been open to the respondents to adduce evidence that they had limited the authority of their clerk in a way not appearing on the face of the instrument and of which the appellants had not received any notice. On the other hand, if a cheque is completely filled up before issue by a customer, and then subsequently altered by the fraudulent or careless action of his agent, to whom it has been entrusted for presentation to a bank, the loss, so long as it is due to a mere alteration in the units or figures or in both, and the customer has not committed any breach of his duty in his relationship to the banker, would fall on the banker : *Colonial Bank of Australasia* v. *Marshall.* (1) The banker would in many cases have no means of detecting whether the fraud or carelessness had been committed in the filling up of a blank cheque or in the alteration of a filled-up cheque, but the question depends on the relationship of agency. Fletcher Moulton L.J. in the case of *Smith* v. *Prosser* (2) says: " The law stands thus. If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument." It was held both by Sankey J. and the Court of Appeal that by the insertion of " 2.0.0 " in figures a limitation did appear on the face of the cheque, and that, therefore, the authority of the clerk was limited within the principle expressed by Fletcher Moulton L.J.

It is, however, I think, necessary to consider more closely the nature of the actual transaction. The document handed by the respondents to their clerk, and intended by them to form the basis of a mandate to the appellants, was a cheque form signed by the respondents with the space for words left blank and " 2.0.0 " inserted in the figure space. If such a cheque form had been presented to a bank, a banker would have probably refused to act upon it, and in ordinary course would have indorsed the form " refer to drawer." It was wanting in an essential particular before the cheque form could be regarded as a mandate for payment, namely, the statement of the amount in the space for words. The form

(1) [1906] A. C. 559. (2) [1907] 2 K. B. 752.

H. L. (E.) 1918 — LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR. — Lord Parmoor.

could only be converted into a mandate which the mandatory would be likely to honour by the clerk filling up the cheque form so as to make it on its face a complete cheque. Sect. 20 of the Bills of Exchange Act was not relied on before this House. In my opinion it is not directly applicable. I agree, however, with Bray J. that s. 20 is founded on a principle of law which applies to this case, and that the clerk may, under the circumstances of this case, be regarded as in the same position as the holder of a negotiable instrument. Sect. 20 provides that when a bill is "wanting in any material particular the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit." The cheque was wanting in a material particular, namely, the insertion of the amount in the space for words, and the clerk must be treated as having authority to fill up this space in any way he thinks fit. So soon as the blank space has been filled up in words by their agent, the respondents are responsible to the same extent as if they had themselves inserted the words. In my opinion the bankers would have been justified in not accepting as a mandate for payment a cheque form in which the amount inserted in the space for words differs from the amount inserted in the space for figures. The same question, therefore, arises as in the case of an agent entrusted with the presentation of a cheque for payment where the cheque form has been handed to him with a different amount in the space for words from that in the space for figures. In such a case some alteration must necessarily be made before the cheque form becomes an effective mandate. My Lords, in my opinion, as against the banker, the customer, under these circumstances, must be taken to have given his agent authority to issue a mandate complete on its face and he is precluded from producing evidence to show that he never gave such authority.

In *Freeman* v. *Cooke* (1) Parke B., in delivering the judgment of the Court, says, in reference to estoppels in pais: "For instance, where a man represents another as his agent, in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he made it himself, and is his contract in point of law; and no form of pleading could leave such a matter at large, and enable the jury to treat it as no contract." A similar question came before Bigham J. in the case of *Union Credit*

(1) 2 Ex. 654, 662.

Bank v. *Mersey Docks and Harbour Board.* (1) In this case the delivery order was signed by the goods owner containing the name of the ship and the number, 246, but leaving a blank in the column provided for designating the quantity of the goods. Nicholls, to whom the delivery order was handed, fraudulently filled in " 263 " in the number column and " 18 hogsheads " in the quantity column. By means of this forged order Nicholls obtained delivery of 18 hogsheads of tobacco warehoused by the Mersey Dock Board. Bigham J. held that the document handed to Nicholls was not a delivery order, but a delivery order form, and that if it had been presented as originally signed the warehousemen would probably have refused to act upon it, since it was wanting in an essential, namely, the statement of the quantity of goods. He held, further, that it became a valid delivery order under the authority which the plaintiffs had conferred upon their agent to convert the order form into an order, and that, under such circumstances, the plaintiffs could not be heard to say that they had instructed their agent to perfect this order in a particular way. Bigham J., in giving his decision, referred to the case of *Young* v. *Grote* (2), which was so constantly referred to in the argument before your Lordships, adopting the opinion of Park J., that the cheque was a genuine order of Young because he had authorized his wife to fill it up, and that when she had filled it up it became his genuine order. It is said that the facts in *Young* v. *Grote* (2) do not support a judgment based on this ground, but the opinion of Bigham J. is not inconsistent with the opinion expressed by other judges of high authority. In *Robarts* v. *Tucker* (3) Parke B., in giving the judgment of the Court, says, referring to *Young* v. *Grote* (2): " In that case the customer had signed blank cheques, and left them with his wife to fill up. She filled them up in such a manner that the holder was enabled to add to the amount; and it was held that the bankers who had paid this larger amount might charge their customer with it. This was in truth considering that the customer had by signing a blank cheque given authority to any person in whose hands it was to fill up the cheque in whatever way the blank permitted." In *Scholfield* v. *Earl of Londesborough* (4) Lord Macnaghten says: " Other judges, including Parke B. himself

(1) [1899] 2 Q. B. 205.
(2) 4 Bing. 253.
(3) 16 Q. B. 560, 579.
(4) [1896] A. C. 514, 545.

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

Lord Parmoor.

in the earlier case of *Robarts* v. *Tucker* (1), have held that *Young* v. *Grote* (2) is to be supported on the ground that the customer had by signing a blank cheque given authority to any one in whose hand it was to fill it up in any way the blank permitted." I do not overlook that Lord Macnaghten had also referred to the opinion of Lord Cranworth L.C. in *Orr & Barber* v. *Union Bank of Scotland* (3) and *Bank of Ireland* v. *Trustees of Evans' Charities* (4), and to the observations of Parke B. in delivering the opinion of the judges in *Bank of Ireland* v. *Trustees of Evans' Charities* (4); but his own opinion appears to agree with that of Lord Watson, who says in his judgment (5): "The reported opinions of the learned judges leave it doubtful whether their decision in *Young* v. *Grote* (2) went upon the doctrine of Pothier, or upon the ground that the customer by signing a blank cheque had undertaken liability for any sum which might be filled in before it was presented for payment."

The second point to consider is whether the respondents did commit a breach of the duty which they owed to the appellants, as their bankers, in and about the preparation and issue to them of their mandate to charge their account. Apart from special contract or some accepted course of dealing between the parties, it is the duty of a customer to use due caution in the preparation and issue of a mandate to his banker to charge his account at the bank, and if he commits a breach of this duty, and thereby misleads his banker to make a payment on a forged instrument, and such payment follows in natural and uninterrupted sequence from such breach, the consequent loss falls, not on the banker, but on the customer. The principle is well established that the negligence which would deprive the customer of his right to insist that payment on a forged cheque is invalid must be negligence in or immediately connected with the actual transaction: *Bank of Ireland* v. *Trustees of Evans' Charities* (6); *Swan* v. *North British Australasian Co.* (7), per Blackburn J. Lord Halsbury in *Bank of England* v. *Vagliano Brothers* (8) says: "The carelessness of the customer, or neglect of the customer to take

(1) 16 Q. B. 560.
(2) 4 Bing. 253.
(3) 1 Macq. 513.
(4) 5 H. L. C. 389.
(5) [1896] A. C. 535.
(6) 5 H. L. C. 389: opinion of Parke B., p. 410.
(7) 2 H. & C. 175, 182.
(8) [1891] A. C. 115.

precautions, unconnected with the act itself, cannot be put forward by the banker as justifying his own default." In the present instance, the negligence alleged on the part of the customer, if there has been negligence, is certainly immediately connected with the transaction itself, namely, in the preparation and issue of the cheque form for presentation to the banker.

The next question, therefore, which arises is whether the act of the respondents did amount to negligence. My Lords, in my opinion the answer is in the affirmative. I have already stated my view that where a cheque form is handed to a clerk for issue with a blank in the space intended for the insertion of the amount in words, there is authority for the clerk to fill up the blank in any way he pleases, and that, when the amount has been so filled in, it must be taken as the genuine entry of the customer. Therefore the conditions in the present case are similar to those which would apply where the customer has handed a cheque to his agent having filled up "one hundred and twenty" in the space for words, and having at the same time placed "2" in the figure space in such a position that there is no difficulty in altering "2" into "120." Can it be said that this is not negligence in the customer? My Lords, such conduct appears to me to be unquestionably negligence in the actual transaction. It is not material to show that in other respects the respondents acted in a reasonable manner, being justified in the confidence which they placed in their clerk. It is, however, not sufficient to show negligence in or immediately connected with the actual transaction unless it can further be shown that the act of the banker in making the payment, of which the customer is making complaint, followed in natural sequence from the negligent act. In the present case the clerk, who, under the conditions already referred to, fraudulently altered the cheque form, presented the cheque for payment. It appears to me that he was enabled to present it in a fraudulent form as the direct result of the customer's negligence, and that thereby the banker was directly misled into making a payment on the forged cheque. If this is a correct interpretation of the conditions, the respondents are not entitled to succeed. An estoppel is created by their negligence in a duty which they owed to their bankers in the actual transaction in question, with the result that evidence is not

H. L. (E.) 1918

LONDON JOINT STOCK BANK v. MACMILLAN AND ARTHUR.

Lord Parmoor.

admissible to prove that the clerk acted fraudulently and in excess of his authority.

My Lords, in the hearing of the appeal a very large number of cases were referred in the exhaustive arguments of counsel. I desire only to refer further to two of these cases. It must be taken that the rule expressed by Ashhurst J. in *Lickbarrow* v. *Mason* (1) is too wide when he says " We may lay it down as a broad general principle, that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," and that the accurate rule is stated by Blackburn J. in *Swan* v. *North British Australasian Co.* (2), who, referring to the judgment of Wilde B., says that " he omits to qualify " the rule he had stated " by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake ; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy." The other case to which I would refer is *Young* v. *Grote.* (3) This has been referred to in a great number of subsequent cases, and in the main with approval ; but, whatever may have been the basis of decision in that case, the principles involved in the duty which a customer owes to his banker have been further defined and made more exact in a number of subsequent decisions.

My Lords, in my opinion the appeal should be allowed.

Order of the Court of Appeal reversed and judgment entered for the appellants. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, June 21, 1918.

Solicitors for appellants : *Morley, Shirreff & Co.*
Solicitor for respondents : *E. H. Coopman.*

(1) (1787) 2 T. R. 63, 70. (2) 2 H. & C. 175, 182.
(3) 4 Bing. 253.

[HOUSE OF LORDS.]

HOOD . . . . . APPELLANT;

AND

ANCHOR LINE (HENDERSON BROTHERS), LIMITED . . . . . RESPONDENTS.

H. L. (Sc.)*
1918
July 1.

Ship—Contract of Carriage—Action by Passenger for Personal Injuries—Condition on Passenger's Ticket limiting Shipowner's Liability—Passenger's Ignorance of Condition—Reasonable Notice.

In answer to an action by a passenger against a steamship company for damages for personal injuries alleged to have been sustained through the negligence of the company's servants in the course of a voyage from New York to Glasgow in a steamship belonging to the company the defenders pleaded a condition in the pursuer's ticket limiting their liability for injury to passengers to 10*l*. The ticket was purchased at the defenders' New York office by one of the pursuer's clerks, who, on payment of the passage money, received in exchange a ticket enclosed in an envelope, on the front of which was printed in capital letters a notice requesting the passenger to read the conditions of the enclosed contract. The ticket contained on its face a printed notice that it was issued subject to the conditions thereinafter set out (which included the condition in question) and at the foot a printed request to the passenger to read carefully the above contract. Neither the pursuer nor his clerk was aware of the conditions:—

Held, that the defenders had taken all reasonable steps to bring to the knowledge of the pursuer the existence of the conditions and that he was bound by them.

Decision of the Second Division of the Court of Session in Scotland, 1918 S. C. 27, affirmed.

APPEAL from interlocutors of the Lord Ordinary (Lord Anderson) and the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie). (1)

The question raised by this appeal was whether a condition limiting the liability of a steamship company in respect of injury to a passenger in one of their vessels had been assented to by the passenger so as to bind him.

* *Present:* LORD FINLAY L.C., VISCOUNT HALDANE, LORD DUNEDIN, and LORD PARMOOR.

(1) 1918 S. C. 27.

H. L. (Sc.) 1918 HOOD v. ANCHOR LINE (HENDERSON BROTHERS).

The Lord Ordinary and the Second Division answered this question in the affirmative and dismissed the action. The facts are fully stated in the judgment of the Lord Chancellor and are summarized in the head-note.

1918. June 7, 10. *Clyde K.C.* (Lord Advocate and Dean of Faculty) (with him *Lieut.-Commander MacRobert* (of the Scottish Bar)) for the appellant. The onus is on the steamship company which carries the passenger to show that the passenger assented to the introduction into the contract of carriage of a special condition which gets rid of the company's common law liability, but the assent of the passenger may be either express or implied. Knowledge, not of the terms of the special condition, but of the fact of its existence, is enough, because that puts upon the passenger the duty of finding out what the conditions are, and if reasonable facilities are afforded for finding that out they may be enforced. The mere tender and acceptance of the ticket does not affect the passenger with notice of a special condition. The notice must be such as to leave the passenger no excuse for not knowing. A passenger is not bound to read his ticket, and least of all is he bound when, as in this case, it is handed to him enclosed in a wrappage. When a passenger pays his fare and takes his ticket he is not bound to know the probability of its containing special conditions. The principle of notoriety might well have been invoked in this class of case, but it has not been. Further, the knowledge must be established at or before the conclusion of the contract, and the contract is concluded when, the fare having been paid, the ticket is put into the hands of the passenger. Knowledge acquired after the contract is made is of no avail. Here the clerk, May, was not even asked whether he knew there were special conditions in the contract, and the onus of proving that is on the carrier. The ticket is wrapped up in an envelope and the condition is not disclosed or published at the time when the ticket is handed over. The case for the company therefore depends upon the printed notice on the envelope. In considering whether the company has taken all reasonable means of bringing the existence of the condition to the knowledge of the passenger it is submitted that the envelope is not the appropriate place for calling attention to the conditions of the contract. What

the company should have done in a case like this was either to get the passenger's signature to the ticket or to tell the passenger that it contained special conditions. The respondents have failed to discharge the onus which was upon them. [He referred to *Henderson* v. *Stevenson* (1), *Richardson, Spence & Co.* v. *Rowntree* (2), *Grand Trunk Ry. Co. of Canada* v. *Robinson* (3), *Canadian Pacific Ry. Co.* v. *Parent* (4), *Harris* v. *Great Western Ry. Co.* (5), *Parker* v. *South Eastern Ry. Co.* (6), *Watkins* v. *Rymill* (7), *Burke* v. *South Eastern Ry. Co.* (8), *Lyons & Co.* v. *Caledonian Ry. Co.* (9), *Williamson* v. *North of Scotland Steam Navigation Co.* (10), and *Cooke* v. *Wilson, Sons & Co.* (11)]

Macmillan K.C. (with him *Charles H. Brown*) (both of the Scottish Bar) for the respondents. The sole question is what is the contract between the parties. It is the duty of the passenger when he is tendered a ticket to see that he has got what he has bought. It is said that the booking clerk ought verbally to notify the passenger that there are special conditions, but the answer is that that is not business. The written word is as good as the spoken word for the purpose of bringing to the passenger's notice the existence of the conditions. Here the respondents took reasonable and sufficient steps to draw the attention of the appellant to the conditions on the ticket. As regards onus, there is no obligation on a steamship company to carry passengers at all, and so far the position of a steamship company differs from that of a railway company, for in the latter case there exists a statutory code applicable to such matters. There is here no legal presumption ab ante of what the contract is going to be, and no question of onus arises.

Clyde K.C. replied.

The House took time for consideration.

July 1. LORD FINLAY L.C. My Lords, the appellant in this case sued the respondents for damages in respect of injuries sustained

(1) (1875) L. R. 2 H. L. Sc. 470, 475, 478; 2 R. (H.L.) 71, 75, 77.
(2) [1894] A. C. 217.
(3) [1915] A. C. 740, 747.
(4) [1917] A. C. 195.
(5) (1876) 1 Q. B. D. 515.
(6) (1877) 2 C. P. D. 416, 421.
(7) (1883) 10 Q. B. D. 178.
(8) (1879) 5 C. P. D. 1.
(9) 1909 S. C. 1185.
(10) 1916 S. C. 554, 561.
(11) (1915) 85 L. J. (K.B.) 888, 894.

H. L. (Sc.)
1918
HOOD
v.
ANCHOR LINE (HENDERSON BROTHERS).
Lord Finlay L.C.

by him through alleged negligence of the respondents' servants. He was a passenger in the *California*, a steamship belonging to the Anchor Line, on a voyage from New York to Glasgow. The vessel grounded off the Irish coast, and the appellant with a number of other passengers was put on board the *Cassandra* for conveyance to Glasgow. It is alleged by the appellant that the servants of the respondents were guilty of negligence in hoisting him on board the *Cassandra* from the lifeboat, with the result that he was thrown out and seriously injured.

This action was brought in the Court of Session to recover damages. The defenders pleaded that by a condition in the pursuer's ticket he could not claim damages beyond 10*l*. The appellant denied that this condition formed part of his contract with the respondents, and a proof was taken upon this point. The Lord Ordinary found that the condition was binding upon the appellant, and he was affirmed by the Second Division. From their decision this appeal is brought to your Lordships' House.

The appellant had reserved accommodation for the voyage from New York on the *California*. A day or two before the steamship was to sail Mr. Newson, one of the respondents' clerks at New York, inquired of the appellant by telephone whether he was going by the vessel on that voyage, and on hearing that he was, requested that the passage money ($150) should be sent. The appellant sent one of his clerks, Mr. Paul May, with a cheque to take the ticket. Mr. May handed the cheque to Mr. Newson and got from him in return the ticket enclosed in an envelope. Mr. May did not take the ticket out of the envelope, but kept it at the appellant's office. Neither the appellant nor Mr. May read the ticket, and neither had any actual knowledge of its contents. Mr. May brought Mrs. Hood to the *California* on the day of sailing and on board met the appellant, who put into his pocket, without reading it, the ticket which Mr. May had brought down from the office.

The " ticket " was a document, No. 27 of process, partly printed and partly in writing, on yellow paper in three portions separated by perforations. The middle portion and that on the right-hand side were detached on going on board the ship by the representatives of the steamship and kept by them. The left-hand portion is that which contains the condition relied on by the respondents, and it

was retained by the passenger. This left-hand portion was headed with the name of the Anchor Line and signed by their agent. In its body it stated that the respondents engaged to provide passage with certain accommodation on a particular voyage, and that they had received the passage money. The conditions were printed below, and prefixed to them was this notice: "NOTICE. This ticket is issued to and accepted by the passenger subject to the following conditions." The 4th condition is that which is material to the present case: "Neither the shipowner, nor the passage broker or agent, is in any case liable for loss of, or injury to, the passenger, or his luggage, or delay in delivery of luggage or personal effects of the passenger, beyond the amount of 10*l.* in the case of each first-class passage or 5*l.* in the case of each second-class or steerage passage, unless the value of the passenger's luggage in excess of that sum be declared at or before the issue of this contract ticket, and freight at current rates for every kind of property (except pictures, statuary and valuables of any description, upon which one per cent. will be charged) is paid." At the foot of the conditions were printed the following words: "All questions arising on this contract shall be decided according to British law, with reference to which this contract is made"; and at the foot of the document in capital letters were the following words: "Passengers are particularly requested to carefully read the above contract." It will be observed that this "ticket" really professes to be a memorandum of the contract. The ticket was handed to Mr. May in a white envelope, No. 28 of process, which appears not to have been closed, although this is not expressly stated in the evidence. On the face of the envelope were given particulars of the ticket, voyage, &c., and at the top of it there was a hand pointing to the following words printed in capitals: "Please read conditions of the enclosed contract," while at the foot were printed some directions as to baggage to be carried in state-room or in hold.

The Lord Ordinary (Lord Anderson) in his opinion of December 23 held that the onus probandi as to this condition forming part of the contract was upon the respondents, and that they had failed in proving that the pursuer was aware of the condition in question. He then proceeded to deal with the question "Did the defenders do what was reasonably sufficient to give him notice of the conditions?"

H. L. (Sc.)
1918
HOOD
v.
ANCHOR LINE (HENDERSON BROTHERS).
Lord Finlay L.C.

He set out the circumstances, and stated in conclusion that he was unable to conceive what further or better means the defenders could have employed to bring to the knowledge of passengers the existence of the contract conditions. He therefore decided in favour of the respondents. The Lord Ordinary's decision was affirmed, and on the same grounds, by the Second Division, consisting of the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie.

In my opinion the Courts below were right. Out of the many authorities bearing upon the point I think it necessary to refer to three only—*Henderson* v. *Stevenson* (1), *Parker* v. *South Eastern Ry. Co.* (2), and *Richardson, Spence & Co.* v. *Rowntree.* (3) The first of these cases is a decision of this House that a condition printed on the back of a ticket issued by a steamship packet company absolving the company from liability for loss, injury, or delay to the passenger or his luggage was not binding on a passenger who has not read the conditions and has not had his attention directed to the conditions by anything printed on the face of the ticket, or by the carrier when issuing it. The second and the third of these cases show that if it is found that the company did what was reasonably sufficient to give notice of conditions printed on the back of a ticket the person taking the ticket would be bound by such conditions.

In the present case the Lord Ordinary and the Second Division found that the company had done what was reasonably sufficient to give the pursuer notice of the conditions. It appears to me that it is impossible to dissent from this conclusion. The contract was entered into on behalf of the appellant by Mr. May as his agent, and the case must be dealt with just as if the appellant in person had done what Mr. May did for him. The envelope in which the ticket was handed to Mr. May had a conspicuous notice upon its front asking the passenger to read the conditions of the enclosed contract. The ticket itself had on its face a notice in conspicuous type that it was subject to the conditions, and at the foot was printed very plainly in capital letters, "Passengers are particularly requested to carefully read the above contract." What more could have been done to bring the conditions to the notice of the passenger? It was argued that the clerk who issued it ought to have given the appellant

(1) L. R. 2 H. L. Sc. 470; 2 R. (H.L.) 71.
(2) 2 C. P. D. 416.
(3) [1894] A. C. 217.

verbal notice of the conditions. I cannot think that such a verbal notice in addition to the printed notice was necessary; indeed, a verbal notice would be much more likely to give rise to doubt and dispute than a printed notice on the envelope and the ticket itself. It was argued on behalf of the appellant that the contract was complete as soon as the cheque had been paid and the ticket had reached the hands of Mr. May, and that any knowledge subsequently acquired of the conditions could not vary the contract. It is quite true that, if the contract was complete, subsequent notice would not vary it, but when the passenger or his agent gets the ticket he may examine it before accepting, and if he chooses not to examine it when everything reasonable has been done to call his attention to the conditions he accepts it as it is.

The law is settled by the cases I have quoted above, and the Courts below appear to me to have been right in holding that the company had taken all reasonable steps to call attention to the condition. In my opinion this appeal should be dismissed with costs.

VISCOUNT HALDANE. My Lords, the question on this appeal is of the nature of those in which the boundary line between law and fact is not of an abstract or definite character. There is a large and varied class of cases where the legal duty of a member of society to his neighbour cannot be laid down a priori or without examining the special circumstances of the situation. The duty in these instances is ascertained by a standard which depends, not on mere general principles fashioned by the jurist, for no such general principles can provide for all the concrete details of which account must be taken, but on the opinion of reasonable men who have considered the whole of the circumstances in the particular instance and can be relied on to say how, according to accepted standards of conduct, a reasonable man ought to behave in these circumstances towards the neighbour towards whom he is bound by the necessities of the community to act with forbearance and consideration. When the law takes cognizance of duties imposed by such social standards it usually refers questions relating to them to a tribunal which is one of fact rather than of abstract legal principle. In cases where the question is whether there is alleged to have been negligence, such as entitles the party injured by it to a remedy from a Court of justice,

H. L. (Sc.) 1918 HOOD v. ANCHOR LINE (HENDERSON BROTHERS). Viscount Haldane.

we are familiar with this procedure, and I think that it is really embodied in the practice adopted by our jurisprudence in the other kind of case that is now before us. Where there is a jury the question is really one of fact for the jury, and the function of the judge is simply to see that the proper question is considered by them, a question which must, up to the point at which it is put, to some extent depend on certain general principles which belong to jurisprudence.

My Lords, I agree that the appellant here was entitled to ask that all that was reasonably necessary as matter of ordinary practice should have been done to bring to his notice the fact that the contract tendered to him when he paid his passage money excluded the right which the general law would give him, unless the contract did exclude it, to full damage if he was injured by the negligence of those who contracted to convey him on their steamer. Whether all that was reasonably necessary to give him this notice was done is, however, a question of fact, in answering which the tribunal must look at all the circumstances and the situation of the parties. On this question even your Lordships sitting here are a tribunal of fact far more than of law, and what we have to do as lawyers is no more than to see that we have shaped for ourselves the question of fact to which I have referred. If this is borne in mind I think that it explains decisions which are not really divergent. In *Henderson* v. *Stevenson* (1) what this House seems to me to have considered was only the particular question of fact which arose in the circumstances of that appeal. In *Parker* v. *South Eastern Ry. Co.* (2) the only question was whether the question had been properly put to the jury. Mellish and Baggallay L.JJ. thought that it had not. Bramwell L.J., dissenting, thought that the facts were such that the jury ought to have been at once directed to find a verdict for the defendants. In *Grand Trunk Ry. Co. of Canada* v. *Robinson* (3) the Judicial Committee obviously thought that the question was in substance one of fact, of the nature which I have indicated, and that no difficulty as to the law applicable arose.

What happened in the transactions before us was very simple. The appellant, being desirous of being conveyed by one of the respon-

(1) L. R. 2 H. L. Sc. 470. (2) 2 C. P. D. 416.
(3) [1915] A. C. 740.

dents' steamers from New York to Glasgow, sent his confidential clerk, Mr. May, to pay the fare and get the ticket at the respondents' office in the former city. Mr. May paid the money, and was handed in exchange an envelope on which was printed prominently "Please read conditions of the enclosed contract." The envelope contained a contract for carriage of the passenger, which included a condition that the respondents were not to be liable in any case for injury to the passenger beyond the amount of 10*l*. No doubt the burden of proof lies on the respondents to show that they did all that was reasonably required in order to bring this condition to the notice of Mr. May, who represented the appellant in the transaction. Have they shown that they did all that could be required reasonably under the usages of proper conduct in such circumstances? I think the Courts below, sitting as a tribunal of fact rather than of mere law, have properly decided that they have. It is true that Mr. May did not look at the envelope closely or refer to the condition. He took the contract away and put it in a safe, and ultimately gave it to the appellant, who did not read it either. But I am of opinion that the real question was not whether they did read it, but whether they can be heard to say that they did not read it. If it had been merely a case of inviting people to put a penny into an automatic machine and get a ticket for a brief journey, I might think differently. In such a transaction men cannot naturally be expected to pause to look whether they are obtaining all the rights which the law gives them in the absence of a special stipulation. But when it is a case of taking a ticket for a voyage of some days, with arrangements to be made, among other things, as to cabins and luggage, I think ordinary people do look to see what bargain they are getting, and should be taken as bound to have done so and as precluded from saying that they did not know.

The question is not whether the appellant actually knew of the condition. I have no doubt that he did not. The real question is whether he deliberately took the risk of there being conditions in the face of a warning sufficiently conveyed that some conditions were made and would bind him. If he had signed the contract, he certainly could not have been heard to say that he was not bound to look. The common sense of mankind which the law expresses here would not permit him to maintain such a position. And when he

H. L. (Sc.) 1918 HOOD v. ANCHOR LINE (HENDERSON BROTHERS). Viscount Haldane.

accepted a document that told him on its face that it contained conditions on which alone he would be permitted to make a long journey across the Atlantic on board the steamer, and then proceeded on that journey, I think he must be treated according to the standards of ordinary life applicable to those who make arrangements under analogous circumstances and be held as bound by the document as clearly as if he had signed it. I am of the opinion that the appeal must fail.

LORD DUNEDIN. My Lords, this is a class of case in which of citing of authorities there is no end, and yet it is, I think, quite possible to say "Hear the conclusion of the whole matter." The case of *Parker* v. *South Eastern Ry. Co.* (1), which has been approved in every case decided since its date, really stereotyped the question which the tribunal, be it jury or judge, must put to itself when such a question arises.

The way in which such a question arises is in this class of cases nearly always the same. The action is founded on an allegation of negligence. Now negligence presupposes a duty. Duty may arise from contract or it may arise from the rules of the common law, using the term common law in the non-technical sense. It has often been pointed out that in the case of carriage there is an admixture, or perhaps I should rather say an overlapping, of both these elements. The duty of a carrier by sea or land to carry a passenger safely may be ascribed to either of the two. But it is clear that when the carrier alleges an exception to that duty the exception must rest on contract. The question, therefore, always comes to this when such an exception is alleged: Was that the contract between the parties?

So far as the law is concerned, a contract of carriage may be constituted by writing or by parol, or may be inferred from the acquiescence of the carrier in the presence of the passenger on the conveyance. Contracts of carriage are not usually made by parol, nor are they usually embodied in signed writings. In so saying I am proceeding on common knowledge as to railways, stage-coaches, and steamers. But what is usual is in truth a question of fact. Accordingly it is in each case a question of circumstance whether the sort of

(1) 2 C. P. D. 416.

restriction that is expressed in any writing (which, of course, includes printed matter) is a thing that is usual, and whether, being usual, it has been fairly brought before the notice of the accepting party. It was to put this question in the form of a convenient issue that the question in *Parker's Case* (1) was framed. How that question is to be answered depends not only on the circumstances of that particular case, but also on the circumstances of the class of cases of which it is one. It is vain to attempt to lay down general rules such as the learned counsel for the appellant sought to extract from the decided cases, e.g., that *Richardson's Case* (2) decided that a passenger was not bound to read his ticket. In the circumstances of this case the learned judges of the Court of Session, who in this matter exercised the functions of both judges and jurors, have found that the respondents did what was reasonably sufficient to bring to the appellant's notice the existence of the condition. I should not disturb such a finding unless I were very clear that it was wrong. As it is, it represents the conclusion at which I should have arrived unaided. I shall only add that I had the advantage of reading the opinion of the noble Viscount who preceded me, and I agree with the view he takes of the cases which he cites.

LORD PARMOOR. (3) My Lords, the only question involved in this appeal is whether the condition on which the respondents rely was a condition of the contract under which the respondents undertook to convey, and did convey, the appellant as a passenger in their ocean-going steamer from New York to Glasgow. The relevant facts for consideration can be shortly summarized. The contract under which the respondents undertook to convey, and did convey, the appellant as a passenger in their ocean-going steamer was concluded when the agent of the appellant received the document or ticket in return for the cheque handed by him to the respondents. This document or ticket was enclosed in an envelope containing on the outside a finger pointing to the words "Please read conditions of the enclosed contract." The enclosed contract was in ordinary printed form, containing on its face the engagement of the respondents to provide the appellant with a passage from New York to

(1) 2 C. P. D. 416. (2) [1894] A. C. 217.
(3) Read by Lord Dunedin.

H. L. (Sc.) 1918 — HOOD v. ANCHOR LINE (HENDERSON BROTHERS). — Lord Parmoor.

Glasgow. There was in prominent type on the face of the document the word "Notice" followed by the words "This ticket is issued to and accepted by the passenger subject to the following conditions." Among the conditions is the one on which the respondents rely in their defence: "Neither the shipowner, nor the passage broker or agent, is in any case liable for loss of, or injury to, the passenger, or his luggage, or delay in delivery of luggage or personal effects of the passenger, beyond the amount of 10*l.* in the case of each first-class passage, or 5*l.* in the case of each second-class or steerage passage, unless the value of the passenger's luggage in excess of that sum be declared at or before the issue of this contract ticket, and freight at current rates for every kind of property (except pictures, statuary and valuables of any description, upon which one per cent. will be charged) is paid." Some criticism was made on the wording of this condition, but it is clear that, if the condition attaches to and forms part of the contract, the appellant cannot recover more than 10*l.* in respect of the injuries he has received and that the action was properly dismissed. There is a further note in special type at the foot of the ticket: "Passengers are particularly requested to carefully read the above ticket."

The Lord Ordinary has found that the respondents did what was reasonably sufficient to give the appellant notice of the conditions. It appears to me that he could not have come to any other conclusion on the question of fact. It is not material that other or different steps might have been taken, so long as the respondents did in fact take sufficient steps to give a reasonable notice. It is not really relevant to inquire whether the passenger can make suggestions for some different form of notice. The object of a notice is to call the attention of the intending passenger to the conditions of the proposed contract, and a clearly printed notice on the enclosing envelope, and on the face of the ticket, is as effective for this purpose as if the representative of the respondents had, at the time when he issued the ticket, verbally called the attention of the appellant to the conditions, and asked him to read them. If an intending passenger, either personally or through his agent, has reasonable notice that the ticket or document handed to him by a carrier contains certain conditions, and accepts the document or ticket as handed to him without objection, and without taking

the trouble to make himself acquainted with such conditions, he must be taken to have assented to them, and they thereupon become evidence of the contract of carriage made between such passenger and the carrier. I cannot doubt that in the present case the conditions printed on the face of the ticket were part of the contractual relationship between the parties, and as such binding on the appellant.

My Lords, much weight was placed by the Lord Advocate in his argument on behalf of the appellant on the principle that the onus of proving that the appellant had assented to special conditions in the contract is placed upon the shipowner. This, no doubt, is a correct proposition, but I am unable to assent to the further proposition that to discharge this onus some exceptional standard of proof is required, based on the theory of the improbability of a passenger on an ocean-going steamer having assented to a contract containing any variation of the ordinary common law obligation. In all cases in which a defendant relies for his defence on the conditions of a contract he must prove that such conditions form part of the contract bargain. It is, however, an extravagant assumption that a passenger by an ocean-going steamship from New York to Glasgow would expect to be carried without a contract containing some conditions, or that he would regard the ticket issued to him merely as a voucher or receipt for payment. Such an assumption might have been admissible in case of a passenger by railway in the early days of railway travelling, but the conditions have changed, and the appellant, in spite of his evidence, is not entitled to claim to be in a better position than other passengers who, in the exercise of ordinary intelligence and common sense, took care to become acquainted with the conditions of the contract, having had their attention called thereto by a reasonable notice. The position as stated by Lord Haldane in *Grand Trunk Ry. Co. of Canada* v. *Robinson* (1) is applicable. "In a case to which these principles apply, it cannot be accurate to speak, as did the learned judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises

(1) [1915] A. C. 740, 748.

H. L. (Sc.)
191
HOOL
v.
ANCHOR LINE (HENDERSON BROTHERS).
Lord Parmoor.

under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined."

My Lords, in my view the appeal should be dismissed.

Interlocutors of the Lord Ordinary and the Second Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, July 1, 1918.

Agents for appellant: *William A. Crump & Son, for G. H. Robb & Crosbie, Solicitors, Glasgow, and Macpherson & Mackay, S.S.C., Edinburgh.*

Agents for respondents: *Botterell & Roche, for Bannatyne, Kirkwood, France & Co., Writers, Glasgow, and Webster, Will & Co., W.S., Edinburgh.*

[HOUSE OF LORDS.]

LONDON COUNTY COUNCIL . . . . . APPELLANTS;

AND

GALSWORTHY AND OTHERS . . . . . RESPONDENTS.

H. L. (E.)*
1918
July 31.

Metropolis—General Line of Buildings—Certificate of Superintending Architect—Order of Tribunal of Appeal—Definition of Building Line—Conclusiveness—Excess of Jurisdiction—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 22, 24, 25, 183.

Upon an appeal against a certificate of the superintending architect of metropolitan buildings appointed under the London Building Act, 1894, whereby he defined the general line of buildings in respect of a block of buildings in which the appellant's house was situate, the tribunal of appeal has jurisdiction to take into consideration the frontages of the buildings situate in the section of the street immediately beyond the block in question and to define the line as continuous with the building line in that section of the street.

Decision of the Court of Appeal [1917] 1 K. B. 902 affirmed.

APPEAL from a decision of the Court of Appeal (1) affirming a decision of the Divisional Court (2) upon a case stated by the Tribunal of Appeal under the London Building Act, 1894, at the request of the appellants, the London County Council.

The facts are fully stated in the report of the case before the Divisional Court.

The questions submitted for the opinion of the Court were:—

(1.) Whether an order of March 12, 1897, was good and binding on the tribunal, having regard to the fact that it included a portion of the road which had not been dealt with by the superintending architect, and in which the building the subject of his certificate was not situate.

(2.) Whether the tribunal ought to have heard the evidence tendered on behalf of the Council.

* *Present:* VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD PHILLIMORE.

(1) [1917] 1 K. B. 902. (2) [1917] 1 K. B. 85.

H. L. (E.) 1918 — LONDON COUNTY COUNCIL v. GALSWORTHY.

(3.) Whether on the facts stated the tribunal had jurisdiction and was right in making an order reversing the certificate of May 31, 1912.

The order of the Tribunal of Appeal was affirmed first by the Divisional Court (Viscount Reading C.J., Ridley J., and Low J.) and afterwards by the Court of Appeal (Lord Cozens-Hardy M.R., Warrington L.J., and Scrutton L.J.).

1918. July 30, 31. *Upjohn K.C.* and *W. Craig Henderson* for the appellants. The order made by the Tribunal of Appeal on March 12, 1897, was in excess of their authority and was not binding on the tribunal which made the order which is the subject of this appeal.

First, under s. 22, sub-s. 1, of the London Building Act, 1894, the duty of the statutory officer is limited to defining the general line of buildings in the row or block of houses in which the building or structure under consideration is situate. In 1897 the superintending architect treated that as the relevant portion of the street and defined the general line of buildings in respect of the particular row or block of houses in question. The Tribunal of Appeal, in extending the building line to a further portion of the street, as to which no question was raised in the proceeding and the parties interested were not before the tribunal, exceeded their jurisdiction, and that excess of jurisdiction vitiates the whole order. It is a question of fact whether a given house or structure is situate in a row which has its own general line of buildings. The appellants ought to have an opportunity of proving that fact for the purpose of showing that the order of the tribunal of 1897 was bad, and the tribunal in the present case ought to have considered the evidence which they tendered.

Secondly, if the tribunal take into account a longer section of the street than that dealt with by the superintending architect, then, inasmuch as the persons interested in the prolongation would have no notice of the proceedings, the tribunal are bound to remit the matter to the architect for that purpose. That is a legitimate inference to be drawn from ss. 24 and 25 of the Act, which deal respectively with notices and appeals. The effect of s. 24 is that there is no power in either the architect or the Tribunal of Appeal to go beyond a distance of one hundred yards—fifty yards on either

side of the building or land to which the building relates, that being the distance in respect of which the duty of the architect to give notice to the owners applies. [They referred to *Barlow* v. *Vestry of St. Mary Abbotts, Kensington* (1), *Lilley* v. *London County Council* (2), and *Duke of Buccleuch* v. *Metropolitan Board of Works.* (3)]

Sir Ernest Pollock K.C. and *C. Herbert Smith* for the respondents were not called upon.

VISCOUNT HALDANE. My Lords, this appeal arises out of a special case which was stated by the Appeal Tribunal under the London Building Act upon a question which arose between the London County Council and a Mr. Galsworthy. The question arose in this way. Mr. Galsworthy is the owner of a couple of houses which are situate in a part of the Euston Road which lies between Fitzroy Street and Southampton Street. Southampton Street is to the west of Fitzroy Street, and to the east of Fitzroy Street lies the Tottenham Court Road. The stretch between Tottenham Court Road and Fitzroy Street is a considerable one.

My Lords, the superintending architect of the London County Council, acting under the Building Act, had purported to fix a building line in the block of houses or row of houses between Southampton Street and Fitzroy Street, where Mr. Galsworthy's house is situated, and he threw the building line further back than it had been supposed to be, as the result of a previously defined building line laid down on a former occasion, and the question that arises is, could he under the circumstances do this ?

My Lords, in the year 1897 a building line for this very block had been ascertained by the architect on February 6. On February 12 there was an appeal to the Appeal Tribunal, and the Appeal Tribunal brought the building line further forward or nearer to the Euston Road, so as to enlarge the ambit of the building powers of the owners of plots of ground. They made a final determination of the line, and the question is whether that determination was a valid determination under the circumstances to which I will now allude. The original decision given on February 6 by the superintending architect

(1) (1886) 11 App. Cas. 257, 263, 267.

(2) [1910] A. C. 1.

(3) (1870) L. R. 5 Ex. 221, 229 ; (1872) L. R. 5 H. L. 418.

H. L. (E.) 1918 LONDON COUNTY COUNCIL v. GALSWORTHY. Viscount Haldane.

was that the building line should be the building line within the row of houses between Fitzroy Street and Southampton Street, and that was what the architect took into account. But when the case came before the Appeal Tribunal in the March following they did something more—they determined as to the building line that it was the general line of buildings on the southern side of the Euston Road between Southampton Street and Tottenham Court Road, of which the block between Fitzroy Street and Southampton Street forms a part, as defined on the plan annexed thereto by a strong green line; and, turning to the plan, this appears. In the section between Fitzroy Street and Southampton Street there are several buildings which project beyond others and come very near to the Euston Road frontage. The Appeal Tribunal apparently took nearly all of the front part of these buildings as indicating the building line, and they then said, "We find that the building line is continuous with the building line which extends from Fitzroy Street onwards to Tottenham Court Road"—in other words, they came to the conclusion that the building line was in fact the building line which extended right from Southampton Street to Tottenham Court Road.

Now it is said that that was ultra vires, that that pronouncement was a nullity, and that if it be so, the architect of the London County Council was quite right when in 1912, disregarding that decision, he made the building line of which the respondent Mr. Galsworthy complains.

My Lords, the question whether or not what was done by the Appeal Tribunal in March, 1897, was ultra vires depends upon the construction of the London Building Act of 1894, and primarily, and in the first instance, upon the 22nd section of that Act. The 22nd section says that "No building or structure shall, without the consent in writing of the Council, be erected beyond the general line of buildings, in any street or part of a street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway, when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway." That refers to the general line of buildings in any street or part of a street, place, or row of houses. Then I come to the words

which show how that line of buildings is to be defined: "Such general line of buildings shall, if required, be defined by the superintending architect by a certificate, such certificate to be issued within one month from the date of the application therefor."

Now, my Lords, I agree that it is not to be assumed that these words allow the superintending architect of his own will to take any ideal line and to say that that is to be the general building line. It must be, I think, a building line having reference to the facts, that is to say, to what is in fact the general line of buildings. But if he wishes to make the line, subject to the provision in the section to which I will presently refer, who is to define what the general building line in reality is? My Lords, the language used seems to me to make the architect the judge of that question of fact, subject to this, that by a subsequent set of sections there is an appeal to a Tribunal of Appeal constituted for the purpose, and which has the same powers, and that was the Tribunal of Appeal which, exercising those powers, made the definition which is complained of in the present case.

My Lords, to me it is clear that under s. 22 what the architect or Tribunal of Appeal have to ascertain is what they consider and define to be the general line of buildings having regard to the facts. Looking at the map and at the houses with which we have to deal in the case before us, as I have already said, certain houses in the block between Fitzroy Street and Southampton Street projected to close on the frontage of the Euston Road, and in the section beyond, which extended from Fitzroy Street to Tottenham Court Road, the bulk of the rest of the houses projected very closely to the Euston Road. It seems to me that that was a matter which the tribunal was entitled to take into account as evidence in coming to a conclusion how they should define what in fact was the general building line; and what they did was, as I read their award, to define a building line for the particular row or block between Fitzroy Street and Southampton Street, but to say, "That building line is really, it appears to us, continuous with the general building line extending to the Tottenham Court Road, and we have taken it into account in coming to our conclusion."

My Lords, I think that was within their power under the words I have quoted, which enabled them to define and left them judges of

H. L. (E.) 1918 LONDON COUNTY COUNCIL v. GALSWORTHY. Viscount Haldane.

the facts to be taken into account in making the definition. If they had acted in such a way with such a gross disregard of all the contour and circumstances of the locality with which they were dealing as to show that they had not defined a building line having any reference to the facts at all, but a purely ideal building line, then there probably would be a very different question ; but what I am dealing with is the facts before the tribunal in 1897 in this case, and on these facts it appears to me that they have not exceeded their jurisdiction under s. 22.

Then, turning to the other section to which our attention was drawn, s. 24, that simply says that the superintending architect is to " cause a notice of his certificate to be served on the local authority, and on the owner of the building or land to which the certificate relates, and on the owner of the houses in the same block or row within a distance not exceeding fifty yards on either side of the building or land to which such certificate relates, or, where there is no such block or row, upon the owner of the adjoining land on either side of the building or land to which the certificate relates. Certificates made by the superintending architect under this part of this Act shall be preserved by the Council, and be open to inspection at all reasonable times by all persons desiring to inspect the same." Then s. 25 says that " the local authority, or any person deeming himself aggrieved by the certificate of the superintending architect, may appeal to the Tribunal of Appeal." Your Lordships will observe that the certificates when made are to be open to inspection—anybody can go and see them, and if he is aggrieved he may appeal to the Appeal Tribunal, and he knows how he stands. It may be that he has not been a party to some appeal that has been heard and with which he might appropriately be concerned, and possibly the Appeal Tribunal might hear him upon that ground ; but the question is purely academic for the purposes of the discussion on which we are engaged, because the London County Council was itself one of the parties to the proceedings in question, and is certainly bound by the decision come to by the Appeal Tribunal in 1897 unless that decision was ultra vires.

Now, my Lords, what I have said really disposes of the matter before us, because I think it makes it plain that what took place took place as a matter, not going to jurisdiction, but going to evidence.

What the Appeal Tribunal did in 1897 was to take into consideration facts in the way of evidence only, which influenced them, no doubt, in coming to a determination. What did they determine? They determined, among other things at any rate, that the building line in the block in question between Fitzroy Street and Southampton Street was what they said it was. No doubt they also said it was continuous with what went beyond, and that may have influenced them in taking it into account. For my part I do not see why it should not have been taken into account, so long as they were really making a decision as to the general line of building in the section between Fitzroy Street and Southampton Street. My Lords, I am quite unable, therefore, to accede to the argument that in doing what they did they violated any restriction on their jurisdiction. Their jurisdiction was to determine the building line in the block in question, and that they did. As regards evidence, that related only to matters of fact which they could properly take into account if they thought fit to do so. I have therefore come to the conclusion that the decisions given in the two Courts below were quite right. There was no necessity to find a separate line for this building, nor as a matter of fact was anything taken into account which ought to have been excluded; the whole matter was matter of cognizance by an expert tribunal, provided it confined itself to matters which were within its jurisdiction.

My Lords, I am therefore of opinion that, so far from the decision being a nullity, it was one that was properly come to under s. 22 of the London Building Act, and I move your Lordships that the appeal be dismissed with costs.

LORD DUNEDIN. My Lords, I concur. Unless the finding of the appellate tribunal in 1897 can be got rid of as a nullity it is conceded that this appeal cannot succeed.

Now the business of the surveyor—and the function of the appellate tribunal was the same as that of the surveyor—was to give a certificate of the general line of building. The general line must be a line taken in reference to a set or series of points viewed as isolated, and then comes the question, what points? What is to be held to be the extent of the territory for which you are to strike your average? That must be a question of fact, and I think it has been so laid

H. L. (E.) 1918 LONDON COUNTY COUNCIL v. GALSWORTHY. Lord Dunedin.

down by the passage which was quoted by the Master of the Rolls from Lord Herschell's judgment, in which he said "It is for the superintending architect to determine the extent of the space along which a line is to be laid down."

My Lords, we have listened to an able, a pertinacious, and at the same time I think I must add a perfectly hopeless, argument to the effect that here there was an excess of jurisdiction. No doubt the jurisdiction of the surveyor and of the appellate tribunal is limited to finding a line at this place. That they did. The media on which they came to a conclusion as to what that line should be are another thing, and are not an independent inquiry, something outside the province of the jurisdiction, but are merely a way of arriving at the result which is to determine the matter which is within the jurisdiction. That view, my Lords, in my opinion disposes entirely of the first point.

As to the second point, besides what his Lordship on the woolsack has said, I think it is enough to say that there is not the slightest idea or hint in the statute that when the appellate tribunal has disposed of the matter it needs to remit its judgment to the surveyor. It seems to me that its judgment comes in place of that of the surveyor, and it as little needed to remit it as an Appeal Court needs to remit to the Court below when it varies a judgment or upsets a judgment which has been pronounced in the Court below.

My Lords, I agree that the appeal should be dismissed.

Lord Atkinson. My Lords, I have very little to add. I think the jurisdiction of the architect and of the Appeal Tribunal was to fix the general building line of the block between Southampton Street and Fitzroy Street, and I think they have done that. The whole of this elaborate argument is directed to show that this has become ultra vires by reason of the mode in which they did it. They had perfect jurisdiction, in my humble judgment, to fix this line as a continuation of the frontage of the houses situate on one side of this block. That was all they did. That does not make it a finding of a general line of building of this particular block without jurisdiction.

My Lords, I quite concur as to the second point under s. 24. The appellate tribunal has power under s. 182 to vary the order in any

way that may seem good to them on the facts, and it would be a strange provision that it should come back then again to the architect to re-form his award, when they themselves are satisfied as to what the particular line should have been.

LORD PHILLIMORE. My Lords, if the line of building including this house was already validly fixed by the order of March, 1897, no doubt the decision of the Tribunal of Appeal which is under consideration in this case was right and the judgments of the Courts below were right and should be affirmed. It is contended that it was not validly fixed because it was too long a line and ran over two blocks of houses.

My Lords, it seems to me that your Lordships are concluded by authority upon this matter. A general building line may differ in different parts of a street, and it is for the superintending architect to determine the extent of the space along which a line is to be laid down in deciding what is the general line of building of any part of the street; that is from Lord Herschell's speech accepted by this House in the *Kensington Case* (1); and he is referring with approval to Lord Selborne's speech in the *Plumstead Case* (2), where these words occur: "as to the extent of the space along which a line is to be laid down there is a necessity here for some exercise of judgment." It is a matter of fact and skill which it is for the superintending architect, or the Tribunal of Appeal taking the place of the superintending architect, to determine, and which no other body has a right to inquire into; and the determination thus arrived at must be accepted.

The further point that the order as made in 1897 might prejudice parties not cited and not expecting to be bound, because it extended the line throughout the long block down as far as Tottenham Court Road and beyond fifty yards from the house in question on either side, may be met in several ways. It may be a necessity of the form of procedure that such should be the case. If we look at the block from Fitzroy Street to Southampton Street it is much more than twice fifty yards, and if a house in that block came for consideration before the architect or the tribunal it might very well be that he or it would arrive at the conclusion that the line should run along

(1) 11 App. Cas. 257, 263. (2) (1885) 10 App. Cas. 229, 243.

H. L. (E.) 1918

LONDON COUNTY COUNCIL v. GALSWORTHY.

Lord Phillimore.

the whole block, and in laying down that building line he or it would affect a number of houses which are beyond the fifty yards, and it may be that Parliament has thought that notification to all those people within fifty yards and giving power to anybody who conceives himself affected to appear either before the architect or before the tribunal would be sufficient. As a matter of fact it cannot be helped. If there is one even block of very considerable length the fixing of the building line over a part of that block will necessarily mean that it will have to be continued over the whole, and that will affect persons who are not present when the line is fixed.

There are other answers. It might be said that the excess was bad and that the rest stood ; and it might be said that the line did not in law, although it would almost certainly in fact, bind owners at a further distance. But however that may be, my Lords, there is nothing in these considerations to fetter the power of the Tribunal of Appeal.

My Lords, I agree with the motion proposed by the noble Viscount on the woolsack.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 31, 1918.

Solicitor for appellants : *D. P. Andrews.*
Solicitor for respondents : *E. H. Galsworthy.*

[PRIVY COUNCIL.]

MARSH AND ANOTHER . . . . . APPELLANTS;

AND

ST. LEGER . . . . . RESPONDENT.

J. C.* 1918 *June* 4.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Crown Lease—Small Grazing Run—Renewal—Rent—Land Act, 1892 (56 *Vict.*, *No.* 37), *s.* 182.

Upon the termination of a lease of a small grazing run in New Zealand the tenant is entitled under s. 182 of the Land Act, 1892, to a renewal at a rental of 2½ per cent. of the value of the fee simple as fixed, less the value of the improvements, by the valuation made under that section. By the words "equal to not less than" in that section the Land Board is not authorized to require a rent exceeding 2½ per cent., and upon the tenant objecting to that rent without objecting to the valuation, to have the lease put up to auction.

APPEAL from a judgment of the Court of Appeal of New Zealand (May 8, 1917).

The appeal was from an order made upon an originating summons taken out by the respondent against the appellants, the Commissioner of Crown Lands for the Land District of Hawkes Bay and the Attorney-General for New Zealand. The summons was referred to the Court of Appeal by the Supreme Court.

The summons raised four questions for the determination of the Court as to the method of fixing the yearly rent at which the respondent, as tenant of a "small grazing run," was entitled to a renewal of his lease. The only question substantially in issue upon the appeal was question 3, which is set out in the judgment of their Lordships; the answer to that question depended upon the true construction of s. 182 of the Land Act, 1892, of New Zealand.

The Court of Appeal, by a judgment delivered by Stout C.J., made the following answer to question 3:—"The provisions of s. 182 in ascertaining the rent must be followed. First, a valuation has to be made by an appraiser to be appointed by the Board.

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD SCOTT DICKSON, and SIR ARTHUR CHANNELL.

J. C.
1918
MARSH
v.
ST. LEGER.

The appraiser is to ascertain the value of the fee simple of the lands included in the lease. Second, the valuation of the substantial improvements of a permanent character. The valuation when made is to be published by serving a copy on the lessee and another copy on the Commissioner not earlier than three years and not later than twelve months before the expiry of the term. If the lessee is willing to accept a fresh lease for twenty-one years he will have to pay a rental equal to, but not less than, 2½ per cent. per annum on the value of the fee simple as fixed. The lessee may fix the rent if he pleases at 2½ per cent. If the valuation is disputed then the rent to be paid must be determined by arbitration as provided by s. 78, which says that it is to be settled in the manner for settling compensation under Part III. of the Public Works Act, 1882."

The answer given to question 4, which is also referred to in the judgment of their Lordships and was varied, was as follows:— "There being no statutory provision defining the principle to be followed by the Compensation Court in fixing the rent, that Court must arrive at a fair rent just as it arrives at a fair price after considering all the circumstances; furthermore the Compensation Court is not limited to fixing the rent at 2½ per cent. per annum on the valuation less the value of improvements." (1)

1918. May 2, 3. *Romer K.C.* and *Northcote* for the appellants.

P. O. Lawrence K.C. and *Thesiger* (for *O. F. Dowson*, serving with His Majesty's Forces) for the respondent.

The arguments sufficiently appear from the judgment.

June 4. The judgment of their Lordships was delivered by

SIR ARTHUR CHANNELL. The only matter really in dispute on this appeal is the construction of one section of the New Zealand statute entitled the Land Act, 1892, but by reason of what appears to be somewhat unskilful drafting, not only of the section in ques-

(1) The answers are given as they appeared from the certificate of the judgment set out in the record. The report at [1917] N. Z. L. R. 365 slightly varies the language. To the answer to the third question, the judgment added: "We are of opinion that it does not come under s. 79, which would be arbitration in a different form."

tion, but of other sections, which if they were quite clear might be expected to throw light on the matter, the point is one of considerable difficulty. It is a point of some importance to all holders of "small grazing runs" under the Act, who are, no doubt, a fairly numerous class.

In 1916 the respondent was the holder of a lease of a small grazing run, originally granted in October, 1896, for twenty-one years from March 1, 1897, expiring therefore on March 1, 1918, and doubts having, in some way not stated, arisen as to the terms on which tenants under such leases had a right to renewal, he, on November 16, 1916, issued an originating summons in the Supreme Court of New Zealand against the present appellants, who are the Crown Lands Commissioner for the district and the Attorney-General of the Dominion, for the determination of four questions arising as to his right of renewal. The summons was by order removed into the Court of Appeal, which Court, on May 8, 1917, gave judgment answering these four questions. The appellants now appeal from that judgment or order of the Court of Appeal. The first and second questions were as to whether the plaintiff's rights as to renewal were governed by the Act of 1892 or certain other Acts referred to in the questions, and the Court held that they were governed by the Act of 1892. Although the appeal is in form to the whole order, the appellants do not question this part of the judgment. The third question was—"Whichever set of statutory provisions defines the plaintiff's right of renewal, has he the right or has the Land Board the right to determine the rental of the renewed term 'at a rent equal to not less than $2\frac{1}{2}$ per centum of the value of the fee simple as fixed less the value of improvements by the valuation'?"

The appeal is on the answer of the Court to this question.

The fourth question related to the procedure in a certain event, and subject to the correction of what is admitted by both sides to have been an accidental error in the order of the Court in referring to the "78th section" when the "79th section" ought to have been referred to, the answer to the fourth question is not complained of. That correction, of course, will have to be made, but it does not affect the substantial question on the appeal.

The answer of the Court to the third question was that the

J. C.
1918
MARSH
v.
ST. LEGER.

provisions of s. 182 in ascertaining the rent must be followed. The judgment of the Court interprets the doubtful words "equal to not less than," which occur in s. 182, by reading them as "equal to *but* not less than," and no detailed reasons are given in the judgment on the points argued before this Board, and it seems probable that, there being other points before the Appeal Court on which a much fuller judgment was given, these points were not then given so much prominence as in the arguments before this Board.

By the Land Act of 1892, a former Land Act of 1885 and an amending Act of 1887 and some other Acts were repealed, and many of the provisions of the repealed Acts were re-enacted verbatim, some substantially altered, and some re-enacted with merely verbal alterations such as are commonly called drafting amendments, intended, it may be assumed, to improve the wording or clear up ambiguities. Part VII. of the repealed Act of 1885 dealt with the subject of "small grazing runs" in twenty-three sections (197 to 219), and Part V. of the Act of 1892 dealt with "small grazing runs" in fifteen sections (172 to 186). In some cases two sections of the first Act are put into one in the second, and practically the scheme is reproduced with comparatively slight alterations and to a great extent in the same words. Sect. 182 of the Act of 1892 takes the place of s. 209 of the Act of 1885. It deals with the subject of renewal, and it makes more absolute the tenant's right of renewal by a substantial variation of the opening words of the section. In the Act of 1885, s. 209 ran: "If on the determination of any lease it be determined that a run either as to the whole or any part thereof, as the case may be, shall again be let, then a new lease of the whole or such part, as the case may be, shall be offered to the existing lessee."

This was in s. 182 of the Act of 1892 altered to "on the expiry or other determination of the lease of any run a new lease shall be offered," &c. Thus the right of the Land Board to decide that the run or part of it should not be re-let was taken away, and the right of the existing lessee to a renewal was extended. Sect. 182 then proceeds in identical words with those in s. 209, with two variations only, one of which causes the difficulty. Each section provides that the new lease is to be offered "at a rent to be ascertained as

hereinafter specified." Then a valuation is provided for of the then value of the fee simple of the lands and also of the improvements made during the term. This valuation is to be made by some one appointed by the Board, and in the Act of 1885 he is called a "valuer," and in the Act of 1892 he is called an "appraiser," and this change of name is the first of the two variations in the language of the two sections. It is obviously a mere drafting amendment. In the Act of 1885 the terms "valuer" and "appraiser" were each used in various places in the Act, and the interpretation clause, s. 3, of the Act, had contained a clause "appraiser *or* valuer means any person appointed to value any land or improvements or other matter under this Act." It was apparently thought by the draftsman of the Act of 1892 to be inartistic to use two words for the same thing, and then to have to resort to an interpretation clause to say that they did mean the same thing, so when drawing the Act of 1892 he chose appraiser as the word to be used throughout, and there is in the interpretation clause, s. 3, of that Act, the same meaning given to "appraiser" as in the former Act but no meaning given to valuer, the term apparently being not used in that Act. This indicates that changes of the language used in the second Act from that found in the former Act may have been made as mere drafting amendments, but except in that way the substitution of the word "appraiser" for the word "valuer" has obviously no bearing on the questions involved in this appeal.

The section goes on again in the same words as are found in the earlier Act and enacts that the lessee shall elect by notice in writing whether he will accept a fresh lease for a further term of twenty-one years at a rental "equal to not less than two and a half per centum of the value of the fee simple as fixed less the value of the improvements by the valuation." The expression "equal to not less than" is what causes this difficulty. The former Act read "equal to $2\frac{1}{2}$ per centum," and the words "not less than" have been introduced. The section goes on to provide in words identical with those of the former Act that in the event of the lessee not agreeing to the valuation, then the rent to be paid shall be determined by arbitration in manner provided by s. 78. The next section, s. 183, proceeds to provide in terms which are similar to, but somewhat varied from, those found in s. 210 of the previous Act for a disposal by auction

J. C.
1918
MARSH
v.
ST. LEGER.

of the new lease in the event of the lessee not electing to accept a renewal " as above mentioned " or refusing or neglecting to execute a lease when tendered to him. Sect. 184, in terms identical with those of s. 211 of the old Act excepting some verbal alterations to make it fit the alteration of language in s. 183, provides for the lessee having notice of the intended auction and having another opportunity of making the election which he had previously omitted to make.

The appellants' case is based on the introduction of the words " not less than." It is of course a sound rule of construction to say that when new words are introduced into what is in other respects old legislation the Legislature must be taken to have intended by the new words either to make an alteration of the previous law, or at all events to clear away an ambiguity in the previous law. The words " not less than " obviously import that the rent may be more than 2½ per cent. The appellants say that it is impossible that the Legislature can have intended to give the lessee the right to propose that the rent should be more than that at which he was to have a right to take the renewal, and that therefore it must be intended that the Land Board, the only other party to the matter, should have the right to propose a rent in excess of the 2½ per cent., and that it is intended that although if the lessee disputed the valuation he would have a right to take the renewal at a rental to be fixed by an arbitrator, yet that if he did not object to the valuation but only to the proposed increase on 2½ per cent. on it, his only remedy would be to let the lease be put up to auction and to bid for it, and that an auction was to be the test of the reasonableness of the rent proposed by the Board. The appellants support this by saying that the language used in the sections presupposes an offer by the Board to be made as they suggest before the valuation, but if not, on giving notice of the valuation. If the appellants' view is correct, the Board have a chance of forcing the lessee to give more than the 2½ per cent. or by refusing to do so to risk losing his holding, and whenever there was likely to be competition they would succeed in doing so.

The respondent, on the other hand, says that the obvious intention of the Legislature when enacting the statute of 1892 was to strengthen and improve, and not to diminish, the value of the

tenant's right of renewal, and that this is shown by the omission in s. 182 of the words of the former Act entitling the Land Board not to re-let the run at all, or not to re-let the whole of it, also by the fact that in s. 172, providing for the length of the original term being twenty-one years, there are added the words " with right of renewal or valuation for improvements as hereinafter provided," which did not appear in ss. 197 and 198, the corresponding sections of the earlier Act. He says that it is inconsistent with anything which can be called a right of renewal to have the rent liable to be raised by the action of the lessor and by the competition of other people. He points out that the lessee, by saying that he disputed the valuation even when he had no real objection to it, could always make nugatory the proposal of a higher rent by the Land Board and secure a renewal at a rent to be fixed by arbitration.

The respondent points out that 2½ per cent. on the difference between the value of the fee simple and the value of the improvements would, when the improvements were carefully valued as items, very probably work out at a sum which might include the decimal fraction of a penny, and at any rate be very inconvenient as a rent to be payable quarterly, and he suggests that the very careful, though possibly not very practical, draftsman of this Act desired to prevent by the added words the possibility of an offer by the Land Board, or an election by the lessee, being held not in accordance with the Act, if it named as the rent the next convenient round sum in excess of that at which the 2½ per cent. worked out arithmetically.

Their Lordships have not had the advantage of knowing the reasons on which the Court of Appeal in New Zealand acted, but the Court obviously adopted the respondent's view by reading the words as " equal to *but* not less than." In any view the words are awkward, and probably tautological. Either " equal to " or " not less than " appear superfluous, but it may be that the draftsman, who seems to have been careful on small points, merely meant to say " equal to, that is to say, substantially equal to and not less than, but not necessarily exactly equal, it may be the next convenient round sum in excess of 2½ per cent.," and this seems to have been the view of the Court. Taking a broad view of the matter, their Lordships fail to find any sufficient ground for

J. C. 1918 MARSH v. ST. LEGER.

saying that the Legislature intended by the amending Act in any way to cut down the right of renewal, and to make the amount of the rent dependent upon anything but the machinery of a valuation. It is assumed in the introductory words of s. 182 that the rent can be ascertained "in manner hereinafter specified," and in the last clause of it that the valuation, if not disputed, will settle the matter. This would not be done if the Land Board had any option which could affect the rent ultimately fixed.

The other provisions of the Act do not throw much light on the matter. The omission of the word "upset" and the other alterations in the wording of ss. 183 and 184 can hardly be meant to introduce the novelty of disposing of the lease by bids of a premium instead of by bids of an increased rent, as there is no provision in the Act for what is to be done with the premium if obtained, but even if it was so it would not affect the construction of the preceding section. There is therefore, in the opinion of their Lordships, no ground for altering the answers given by the Court below to the questions put by the originating summons except by making the corrections necessitated by the Court having overlooked the fact that, by an amending Act of 1893, s. 182 of the Act of 1892 had been amended by substituting the machinery of s. 79 for that of s. 78. This correction does not affect the merits of the appeal.

Their Lordships will therefore humbly advise His Majesty that the answer of the Court below should be varied by substituting s. 79 for s. 78 in the answer to the third question, and by deleting the words of that answer after "78," and by substituting in the answer to the fourth question the words "arbitrators or arbitrator" for "Compensation Court," and for "that Court." where these words occur, and that, except as to that variation, the appeal should be dismissed, and that the appellants should pay to the respondent the costs of the appeal.

Solicitors for appellants: *Mackrell, Maton, Godlee & Quincey.*
Solicitors for respondent: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

JAYAWICKREME AND ANOTHER . . . . APPELLANTS;

AND

AMARASURIYA (SINCE DECEASED) . . . . RESPONDENT.

J. C.*
1918
June 4.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Roman-Dutch Law—Contract—Justa Causa Debendi—Compromise of Invalid Claim—Moral Obligation.

A promise deliberately made in compromise of threatened legal proceedings upon a claim honestly put forward is enforceable under Roman-Dutch law, although the claim was invalid; the promise is equally enforceable under that system if the motive for it was a sense of moral obligation or generosity, and not a desire to avoid litigation. In either case there is justa causa debendi.

APPEAL from a judgment of the Supreme Court of Ceylon (February 19, 1915) affirming a judgment of the District Judge of Galle.

The suit was instituted by the appellants (wife and husband respectively) against the deceased respondent, the brother of the first appellant, to recover Rs.5500 as the balance due to the first appellant under an agreement made in compromise of a claim based upon an alleged trust, in respect of which claim legal proceedings had been threatened.

The Supreme Court, affirming the District Judge, dismissed the suit. The circumstances of the case and the grounds of the judgments in Ceylon sufficiently appear from the judgment of their Lordships.

1918. May 3, 6. *P. O. Lawrence K.C.* and *Sproule* for the appellants. The evidence shows that the promise was made in compromise of threatened proceedings upon a claim put forward bona fide and honestly. There was, therefore, in English law good consideration, even if the claim was invalid: *Miles* v. *New Zealand Alford Estate Co.* (1) A fortiori, in Roman-Dutch law, which

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD SCOTT DICKSON, and SIR ARTHUR CHANNELL.

(1) (1886) 32 Ch. D. 266.

J. C. 1918 — JAYAWICKREME v. AMARASURIYA.

governs the matter, the promise was enforceable. In that system Justa causa debendi to sustain a contract includes a moral obligation or benevolence. A voluntary and deliberate promise upon any reasonable cause is in Roman-Dutch law a good contract, even if it would have been nudum pactum in Roman law: *Lipton* v. *Buchanan* (1); Kotze's translation of Van Leeuwen, footnote, pp. 28 to 30; Pereira's Laws of Ceylon, 2nd ed., pp. 565 to 570; Maasdorp, Institutes of Cape Law, 1907, vol. 3, p. 35.

Hon. F. Russell K.C. and *H. E. Miller* for the respondent. The plaint alleged that a trust existed and that the promise was made upon threat of legal proceedings. The Courts in Ceylon rejected both allegations; they consequently properly dismissed the suit. It is conceded that the promise was made, but there was no consideration or justa causa to support it. The evidence did not show that there was any threat of legal proceedings.

June 4. The judgment of their Lordships was delivered by

LORD ATKINSON. The original defendant, Henry Amarasuriya, died since the commencement of this action, and his widow and executrix has been made a defendant in the suit. She is the sole respondent. The female plaintiff and the original defendant were sister and brother, children of T. D. S. Amarasuriya, deceased, who died in the year 1907 possessed of some considerable property which he left by will to his widow. The widow subsequently made over this property to the deceased defendant without making any substantial provision for the female plaintiff and her family.

The action was brought to recover a sum of Rs.5500, the unpaid balance of a sum of Rs.30,000 alleged to have been on or about July 31, 1912, promised and agreed by the deceased defendant to be by him paid to the female plaintiff on March 31, 1913.

The parties had disagreed as to the issues upon which they should go to trial, and thereupon the two issues following were (amongst others) framed by the District Judge:—"1. Did the defendant on or about July 31, 1912, promise and agree to pay first plaintiff a sum of Rs.150,000 in five annual instalments of Rs.30,000, each payable on March 31 in each year, the first payment to be made

(1) (1904) 8 Ceylon N. L. R. 49; (1907) 10 Ceylon N. L. R. 158.

on March 31, 1913, and were the promise and agreement made for the reasons and considerations stated in the 5th and 6th paragraphs of the plaint ? 2. Were the payments made by the defendant in fulfilment of the said agreement or out of generosity to the plaintiff and her children ? "

The first issue was treated by the learned District Judge who tried the case as composed of two parts, involving two distinct but inseparable issues—the first part putting in issue the making of the promise mentioned, which the defendant stoutly denied ; and the second part, designed apparently to raise two questions : first, whether the consideration for the deceased defendant's promise alleged in the 5th and 6th paragraphs of the plaint had in fact moved to and been received by him ; and, second, whether, even if it had so moved and been received by him, it amounted to good consideration for his promise according to English law or a justa causa debendi according to Roman-Dutch law. The consideration, as stated in the above-mentioned paragraphs of the plaint, was in effect this, that the deceased defendant held certain property received by him from his father through his mother in trust for himself and the female plaintiff in equal shares ; that she, the female plaintiff, had threatened to institute against him a suit to compel him, in performance of that trust, to assign to her an undivided half-share of this property ; that after much negotiation an amicable settlement was, on or about July 31, 1912, arrived at on the terms following : first, that the female plaintiff should refrain from instituting the contemplated action, and should not assert title to any share of the aforesaid properties ; and, second, that the deceased defendant should in consideration thereof pay to her a sum of Rs.150,000 in five yearly instalments of Rs.30,000 each on March 31 in each and every year. The female plaintiff may in those two paragraphs have phrased her claim too strongly in point of law, but it is not found proved, or even alleged in the pleadings, that she had not made it honestly, in perfect good faith, and in the bona fide belief in its justice and legality and, if pressed to a conclusion, in its ultimate success.

Both Courts below have found that the deceased, despite his sworn evidence to the contrary, did make the promise in the first part of the above-mentioned issue set forth, and not only this, but

J. C. 1918

JAYAWICKREME v. AMARASURIYA.

that he had paid to the female plaintiff in pursuance of it a sum of Rs.24,500. But when the District Judge came to deal with the second part of the issue, namely, " the reasons and considerations " for which this promise was in the 5th and 6th paragraphs of the plaint alleged to have been made, he in effect started to try upon its merits the suit threatened by the female plaintiff against her brother to compel him to perform the trust by which she alleged he was bound. He found that the alleged trust was not proved, but that it was established that the deceased defendant felt himself under a moral obligation to perform the sacred duty imposed upon him by his father's verbal enjoinder, " which was not legally compellable " to provide for his sister, the female plaintiff, and her family ; " that he had knowledge that litigation would result," which in their Lordships' view must mean litigation at the suit of his sister, directed to enforce this obligation, misnamed by her a trust, and that it " was in that state of mind he promised and agreed to pay her Rs.150,000 in five years and be quit of the duty." Upon the second issue he found that the payment of Rs.24,500 was made " in pursuit of the agreement arrived at, that is was not made for the reasons and considerations stated in the 5th and 6th paragraphs, but something different, namely, the responsibility and duty of providing for his sister and her family." This he describes as something more than generosity, since it was made under a moral obligation and in pursuit of a promise. He then sums up the grounds of his decision in the words following :—" To sum up, then, the position is this. The plaintiffs have proved a promise and an acceptance. They have failed to discharge the burden of proving the ' trust ' and ' agreement ' set out in the paragraphs 2 and 3 and 4 of the plaint. Their justa causa fails ; and if the two parts of the first issue must stand or fall together their whole case falls to the ground. I do find that the inducement for the promise was quite of another kind, viz., the consciousness that the defendant had received the larger share of the inheritance of the father and that he was in duty bound and charged with the sacred trust of providing for his sister and her family. He had taken all the estate, except the amount which had gone to the plaintiffs—whether Rs.60,000 or Rs.100,000. The plaintiffs have not been able to deny that the defendant had

Rs.240,000 to pay as his father's debts, however incurred; but they aver that the father was worth Rs.600,000 or Rs.700,000. I came to the conclusion that the 'moral obligation' created the 'sacred trust' reposed in him to support the family of his sister does not constitute an adequate justa causa debendi for the pact to pay Rs.150,000. The justa causa pleaded by the plaintiffs fails. There is no alternative but to dismiss the plaintiffs' action with costs."

It is plain from these passages that the decision of the learned District Judge was based upon the view that the compromise could not be supported, because the alleged trust which the female plaintiff threatened to enforce by action was not a valid trust enforceable at law, nor a justa causa debendi. He thus permitted himself to be led astray by the form of the pleading and the issue from determining whether the alleged compromise which it was sought by the suit before him to enforce was valid into that of determining whether the threatened suit alleged to have been compromised could have succeeded if prosecuted to its end—a wholly different and irrelevant question. The legal validity or invalidity of the claim the female plaintiff threatened to enforce by action is entirely beside the point if she, however mistakenly bona fide, believed in its validity. Blackburn J., in *Callisher* v. *Bischoffsheim* (1), pointed out that in *Cook* v. *Wright* (2) it was decided that even if the defendant actually knew that the plaintiff's claim, which was compromised, was invalid, yet the compromise of it was enforceable; and it was in the former case decided that the compromise of a disputed claim made bona fide is a good consideration for a promise, even though it ultimately appears the claim was wholly unfounded. In the case of *Miles* v. *New Zealand Alford Estate Co.* (3), Bowen L.J., as he then was, said: "It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be in the wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up

(1) (1870) L. R. 5 Q. B. 449, 452.
(2) (1861) 1 B. & S. 559, 570.
(3) 32 Ch. D. 266, 291.

J. C.
1918
JAYAWICK-REME v. AMARASU-RIYA.

must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law it is obvious you could never safely compromise a question of law at all."

In the Court of Appeal in the present case the learned Chief Justice states in the following passage the grounds of his judgment. He said: "The defendant had benefited largely by his father's death, and there can be no doubt that it was his father's wish that he should provide for the first plaintiff and her large family. He was aware that the first plaintiff, under the influence to some extent of her husband, had thoughts of involving him in legal proceedings. But the District Judge does not find, and the evidence would not in my opinion have supported him had he done so, that the fear of litigation was the motive for the agreement into which he entered to pay the first plaintiff a sum of Rs.150,000. The District Judge expressly holds that the defendant's action in this matter was guided by his father's wishes and by his consciousness that he had himself been enriched out of the family property to a far greater extent than his sister. In these circumstances the present action which is based on an allegation of a trust imposed upon the defendant by his father in the first plaintiff's favour must fail."

Shaw J. said: "The learned District Judge in the course of his judgment finds that the defendant did promise to pay the second plaintiff Rs.150,000 and that he in fact did make payments in fulfilment of the said promise. He also finds that the consideration for the payments was something more than mere generosity and was the responsibility and duty of providing for the plaintiff's family, and that the payments were made under a moral responsibility in pursuit of the promise." He concurred in the result with the Chief Justice.

It is plain, therefore, from those passages that the decision of the Court of Appeal, like that of the District Judge, was not based on any assumption that a dispute had not arisen between the female plaintiff and her brother touching her claim upon his

property, nor that she did not threaten litigation against him to enforce it, nor that the threatened suit had not been compromised, but solely on the ground that the "trust" upon which she alleged in her pleading he held the aforesaid property was not valid in law or did not exist. She was held rigidly bound by the word "trust" used in the pleading, and her action defeated, not because she had no just claim to relief, but because her claim was not of the kind she had described it to be.

It may well be that according to English law, as a general rule, an existing moral obligation not enforceable at law does not furnish good consideration for a subsequent express promise (*Eastwood* v. *Kenyon* (1); Pollock on Contracts, 8th ed., p. 189); but the Roman-Dutch law, by which, in their Lordships' view, this case must be governed, is wholly different. According to the latter law it would appear that a promise deliberately made to discharge a moral duty, or to do an act of generosity or benevolence, can be enforced at law (2), the justa causa debendi, sufficient according to the latter system of law, to sustain a promise, being something far wider than that which the English law treats as good consideration for a promise.

In Pereira's Laws of Ceylon, 2nd ed., p. 568, it is stated that where there is what the English law treats as consideration for a contract there is what the Roman-Dutch law treats as a justa causa debendi for it, but that the converse is by no means true; that these latter terms have a much wider meaning than the English word "consideration," that they comprise motive (sensu latiori) or reason for a promise, or what in English law is known as purely moral considerations; that, according to the Dutch author, Van der Keessel, a promise which is not founded on a justa causa debendi (i.e., obligandi) does not give a right of action, although otherwise an action is maintainable on a nudum pactum. He then quotes, apparently with approval, the following passage from Morice's English and Roman-Dutch Law, 2nd ed., p. 78: "Under

(1) (1840) 11 A. & E. 438, 446.

(2) [This is the general rule in modern jurisdictions where Roman law has been received. In Scotland gratuitous obligations are effectual, subject to the rule that money obligations are required to be in writing: Bell, Principles. §§ 63, 67.—F. P.]

J. C. 1918

JAYAWICKREME v. AMARASURIYA.

Roman-Dutch law a consideration in the English sense of the word is not an essential of a contract. The nearest approach to anything of the nature is the cause or causa, the presence of which is essential to a contract. The causa was taken from Roman law, and is perhaps the germ of the English doctrine of consideration. . . . . The meaning appears clearly from Grotius's expression 'reasonable cause.' There must be a reason for a contract, a rational motive for it, whether that motive is benevolence, friendship, or other proper feeling, or, on the other hand, of a commercial or business nature. In other words, the agreement must be a deliberate, serious act, not one that is irrational or motiveless. This point of view would appear very similar to that of English law in recognising the validity of a contract under seal without consideration. The solemn forms of the deed under seal are assumed to involve deliberation."

In *Lipton* v. *Buchanan* (1) the two defendants, named respectively Buchanan and Frazer, were partners in trade. They incurred a debt to the plaintiff, for which they were of course jointly and severally liable. The partnership was subsequently dissolved by a decree of the Court and a receiver appointed. Frazer paid to the plaintiff, through the receiver, one-half of this debt, the plaintiff, in consideration thereof, undertaking not to take any steps against Frazer personally for the recovery of the balance due by the firm until he had exhausted every possible means of recovering it against the other partner, Buchanan. At the date of this payment Buchanan was possessed of ample means to pay his debts. The plaintiff delayed taking action against him for more than a year, during which time Buchanan incurred additional debts, in the payment of which his property was exhausted. Thereupon the plaintiff sued both the former partners for the unpaid balance of the partnership debt. Two points bearing upon this case were decided. First, that the case did not come within Ordinance 22 of 1866, which applies the English law to partnership transactions, and that it was therefore governed by the common law of Ceylon, which was the Roman-Dutch law; and second, that the maxim of the Roman law, ex nudo pacto non oritur actio, did not obtain in the Roman-Dutch law, and that causa in the latter law denotes the ground, reason,

(1) 8 Ceylon N. L. R. 49.

or object of a promise ; that it has a much wider meaning than the English term " consideration," and comprises motive or reason for a promise, and also purely moral consideration ; and it was accordingly held that there was a lawful causa for the above-mentioned agreement by the plaintiff, inasmuch as the receiver, though he had been in possession of the assets of the firm for three years, had not been able to pay the plaintiff anything, and that Frazer then came forward and paid half the debt, presumably saving the plaintiff further delay and trouble.

It would, in their Lordships' view, appear from these authorities that the plaintiffs in the present case could have successfully maintained an action against the deceased defendant on the promise mentioned in the first part of the above-mentioned issue even if no suit had ever been threatened and no compromise ever been made, inasmuch as the promise was made deliberately after much negotiation, in discharge of the moral obligation found to rest upon the deceased defendant to do an act of generosity and benevolence to his sister, namely, to make a provision for her and her children ; but however that may be, it is perfectly clear that if the female plaintiff had threatened to institute a suit to compel her deceased brother to discharge this moral obligation and do this act of benevolence to her, and had undertaken not to proceed with that suit on the terms that he should make the above-mentioned promise, the promise could, according to the Roman-Dutch law, have been enforced whether the suit was likely to fail or not.

But that is very much what the female plaintiff really did. The deceased defendant, in his letter dated March 7, 1912, addressed to his sister while their mother was still alive, stated that he and his mother were prepared to do what was required of them for the welfare of her, the sister's, family. The District Judge has found that the female plaintiff's letter of March 10, 1912, was not proved to have reached the deceased defendant ; but she wrote it. It is an indication of her mind and intention at all events, though he cannot be fixed with knowledge of its contents. It contains a distinct threat to institute litigation to obtain from the brother a share of her father's property. Dr. Cooray, in his letter of March 27, 1912, to the deceased defendant, his uncle, distinctly stated that the female plaintiff was willing to accept Rs.150,000, secured by a

J. C.
1918
JAYAWICK-REME v. AMARASU-RIYA.

promissory note and payable in three instalments, and mentioned that he, the writer, considered it very commendable in his uncle to have made up his mind to settle the dispute in this manner. The deceased defendant replied to this letter on March 30, stating that he offered to give her money, not on a business note, but upon an agreement which would be more binding. [Their Lordships' judgment referred in detail to further correspondence between the deceased defendant and Dr. Cooray, and to the evidence of Dr. Cooray as to verbal negotiations with the defendant, in which the proposed proceedings were referred to, and the defendant agreed to make the payments if the claim were withdrawn; the judgment continued:] That evidence is absolutely consistent with the letters above referred to, and is corroborated by them, and from both it is, in their Lordships' view, perfectly clear that the female plaintiff had long asserted a claim to the land the deceased defendant had derived from his father; that there was a dispute between them as to whether this claim was good; that she threatened to institute proceedings to enforce it, and that the deceased defendant agreed to compromise with her by paying her Rs.150,000 on the instalments described in satisfaction of this claim. The validity of the claim, or the ultimate success of a suit brought to enforce it, is entirely beside the point. On those facts the plaintiffs were, in their Lordships' opinion, entitled to succeed in the present action. The question is, are they to be denied justice because their pleader has chosen to overstate his clients' case and the judge to frame an issue embodying that overstatement?

If at the trial, which did not take place before a jury, the learned District Judge, who had full control over the record, had amended the issue so as to suit the facts proved, he should, in their Lordships' opinion, have given a decree in favour of the plaintiffs for the sum sued for. He did not do so. He, on the contrary, seized upon the word "trust" used in the 5th paragraph of the plaint, and, having found that no trust existed, decided against the plaintiffs, although they had established before him a good and meritorious cause of action according to the system of law applicable to the case.

Their Lordships are therefore of opinion that the decision appealed from as well as that of the District Judge were on the facts proved at the trial erroneous, and should be set aside, and this appeal

be allowed with costs here and below, and that judgment be entered for the appellants for the sum sued for, and they will humbly advise His Majesty accordingly.

J. C. 1918 JAYAWICKREME v. AMARASURIYA.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondents: *T. L. Wilson & Co.*

[PRIVY COUNCIL.]

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES AND ANOTHER . . } APPELLANTS;

AND

FELS . . . . . RESPONDENT.

J. C.* 1918 *June* 16.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Evidence—Document—Secondary Evidence—Notary's Certificate—Deposit in Foreign Court—Seal of Court—Evidence Act (No. 11, 1898, New South Wales), s. 21.

The Evidence Act, 1898, of New South Wales, which closely follows the Evidence Act, 1851 (14 & 15 Vict. c. 99, Imp.), by s. 21 provides: "Evidence of (*a*) any judgment, decree, rule, order, or other judicial proceeding of any Court of justice out of New South Wales; or (*b*) any affidavit, pleading, or other legal document filed or deposited in any such Court; may be given by the production of a copy thereof— . . . . (*d*) sealed with the seal of such Court, ..."

According to the law of Warsaw, a marriage settlement is always prepared by a notary, the original being contained in his books of record; upon the death of the notary his books are deposited in the Warsaw Circuit Court. In a suit in New South Wales there were tendered as evidence of the terms of a marriage settlement made in Warsaw in 1879 two documents, namely, (1.) a document dated in 1885 purporting to be certified by a notary as a copy of a settlement of 1879 in his record, (2.) a document dated 1915 purporting to be a copy of the settlement from the notary's book, certified and sealed by the Circuit Court, and stating that the notary being dead his records were kept in the Court. The two purported copies were in identical terms:—

Held, that neither document was admissible in evidence at common law, but that the document of 1915 was admissible under

---

* *Present:* EARL LOREBURN, LORD BUCKMASTER, and LORD SUMNER.

J. C.

1918

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES v. FELS.

s. 21 of the Evidence Act, 1898, the marriage settlement being a "legal document" within that section.

The identity of the terms of two copies of a document made at different dates, though widely separated, is no evidence that they were made from a common source which has been correctly copied.

Although in certain circumstances a copy produced from proper legal custody may, after lapse of time, be treated as evidence, that rule does not apply when the original is in existence, and a copy capable of being obtained and properly proved.

APPEAL from a decree (November 14, 1916) of the Supreme Court of New South Wales in its equitable jurisdiction, made by Harvey J.

The suit was brought by the respondent against the appellants as executors of the will of her deceased husband, claiming that she was entitled to a one-half share in all the property acquired by the testator during the existence of the marriage, other than property acquired by gift or inheritance. The claim was based upon an antenuptial settlement said to have been made in 1879 in Warsaw, where the respondent and her deceased husband were then domiciled.

The only substantial question of law arising upon the appeal was whether either of the two documents shortly described in the head-note, and more fully in the judgment of their Lordships, had been properly admitted as evidence of the terms of the settlement.

Harvey J., the trial judge, made a decree as to one half of the property referred to which remained in the estate of the testator at his death.

1918. June 6, 7, 10, 11. *P. O. Lawrence K.C.*, *Schwabe K.C.*, and *Guedalla* for the appellants. Apart from the Evidence Act, 1898, neither document was good secondary evidence in the absence of a witness to prove that he had made the copy or examined it with the original. The certificate of a notary does not make a document evidence according to English law: *Nye* v. *Macdonald*. (1) The decision in *Geralopulo* v. *Wieler* (2) related to the protest of a dishonoured bill, and there the notarial act was itself the original document. The maxim "omnia praesumuntur" applies only to the act of certification, not to show that the copy had been properly

(1) (1870) L. R. 3 P. C. 331. (2) (1851) 10 C. B. 690.

examined. There was nothing to show that a certified copy would have been evidence at Warsaw. The Evidence Act, 1898, like the English Evidence Act, 1851 (known as Lord Brougham's Act), refers only to documents of an official or public character which cannot be proved save by the method enacted. It does not apply to a marriage settlement. A marriage settlement is not included in s. 21 (*b*) of the Act of 1898. The documents there specified are all documents coming into existence in the course of litigation; a marriage settlement is not ejusdem generis.

Maugham K.C. and *Dighton Pollock* for the respondent. The documents were properly admitted apart from the statute. It cannot be that prior to the statute there was no method of proving in New South Wales a document in Poland without calling a witness. When an official issues a certified copy of a document in his custody the copy is evidence as to the terms of the original: Taylor on Evidence, s. 1591. It cannot be disregarded that both copies purporting to be made at widely different dates are identical. All that was required was some evidence, since there are no degrees of secondary evidence: *Doe* v. *Ross*. (1) The decision in *Geralopulo* v. *Wieler* (2) shows that special weight attaches to notarial documents. The document of 1915 was admissible under s. 21 (*b*) of the Evidence Act, 1898. If a narrow construction is given to the words "other legal document" many documents in a foreign registry of deeds cannot be proved. The words "or deposited" in s. 21 (*b*) show that the documents intended are not solely those originating in litigation. Further, the settlement is a document of a public nature within s. 16; when made it had to be posted up at the Court. But, apart from the two documents admitted, the respondent gave evidence as to the terms of the original from her recollection, and she was not cross-examined on the point. Her evidence was good secondary evidence, since the original could not be produced, and was sufficient to establish the material terms.

P. O. Lawrence K.C. replied.

July 16. The judgment of their Lordships was delivered by

LORD BUCKMASTER. This appeal raises for consideration two questions—the one as to whether certain documents were rightly

(1) (1840) 7 M. & W. 102. (2) 10 C. B. 690.

J. C.
1918

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES v. FELS.

admitted in evidence, and the other as to the true effect and construction of these documents if they be admitted.

There is no real controversy as to the facts which have preceded and caused the litigation. On March 22, 1915, Frederick Fels died at Sydney in New South Wales leaving considerable property. His will was dated December 24, 1912, and by it he appointed as executors the appellants, to whom probate was duly granted on July 6, 1916. Before the grant, namely, on September 8, 1915, the respondent instituted against the appellants the proceedings out of which this appeal has arisen, claiming that she was the wife of the testator, and as his wife was entitled by virtue of a marriage settlement to one half of the property that he had acquired during their marriage; she included in her claim certain property at Springwood in New South Wales, but this was held by the learned judge who tried the case to be the sole property of the appellant Dora Fels, and from that part of his judgment no appeal was brought. The rest of the claim he decided in favour of the respondent, and against this decision the present appeal is brought.

The respondent was admittedly married to the testator at Warsaw in Poland on April 29 or May 11, 1879, by a religious ceremony, and on May 10 or 22, 1879, by a civil ceremony, the variation in the dates being due to the difference between the old and the new style of computing the days of the month. There were five children of the marriage, two sons and three daughters, of whom one son and one daughter died in infancy, the remaining son and two daughters being still alive. In 1885 the testator deserted his wife, left Warsaw for England, and from thence sailed to New York; from New York he went to San Francisco, and ultimately to Sydney. The appellant Dora Fels, who is also a native of Warsaw, had herself left Warsaw independently of the testator, but they were known to each other, and on meeting an attachment sprang up, which the testator sought to solemnize by marriage in San Francisco. He accordingly attempted to divorce his wife and went through a ceremony of marriage with the said appellant, who doubtless believed that the divorce had been effectual. For reasons into which it is unnecessary to inquire it has been, however, decided by the learned judge who tried the case that no divorce was in fact effected, but the testator lived with the appellant Dora Fels as

his wife before the whole world until he died. There seems to have been no issue of the union. She appears to have been a woman of considerable character and skill, and by means of her energy and talent there was obtained the means by which the testator built up a substantial fortune, which, subject to the respondent's claim, formed his estate at the date of his death.

The detailed terms of the testator's will are not important. He gave an annuity of 52*l.* to the respondent, and, after certain other annuities and legacies, gave the residue to the trustees and directed payment of the income to the appellant Dora Fels, whom he described as "my present wife," for her life, she maintaining throughout his son Frederick Fels and educating and bringing up in a manner suitable to her station his granddaughter Bessie Strickgold while she remained unmarried, the ultimate trust of the residue being in favour of his children Stanley Fels and Salis Danziger and his granddaughter Bessie Strickgold.

The real question is not, however, as to anything contained in the terms of the will, but upon what estate the will is capable of operating. That the property which passed at the testator's death was entirely made either by the testator alone or by the joint efforts of himself and the appellant Dora Fels is beyond dispute; but the respondent asserts that by a marriage settlement duly executed on March 21, 1879, it was provided that all the property gained by the endeavour of either of the spouses during their lives should be the common property of both, and accordingly upon his death one half of the property so acquired by the testator belongs to her.

That a marriage settlement was in fact executed is proved, but the original is in the custody of the Courts at Warsaw and cannot be produced, and the respondent was therefore entitled to rely on secondary evidence of its contents. To furnish this evidence she has put forward two alleged copies of the settlement which were admitted by the learned judge, and the first and the most difficult question upon this appeal was whether that admission was rightly made.

According to the law of Warsaw a marriage settlement is always prepared by a notary; the original is contained in one of his books of records duly signed by the parties, and authenticated copies are given by him to the husband and the wife. Upon the death of the notary his books of records go to the archives of the Warsaw

J. C. 1918

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES v. FELS.

District Court, by whom they are retained, and from whose custody they are not permitted to depart. The original, therefore, cannot possibly be produced, and if copies are properly proved they become good secondary evidence.

Two copies are furnished in the present case, neither of which is the original copy delivered by the notary to the wife on the marriage. The first is dated 1885 and came into existence because the respondent lost the original copy given to her. Upon its loss she applied to her father-in-law for a further copy, and he handed to her the first of the two documents which it is sought to use. The second copy came into existence in connection with the trial. It bears upon it the seal of the deeds registry of the then Warsaw Circuit Court and also the seal of the Warsaw Circuit Court itself, and contains the following indorsements :—

" This copy, which is exactly alike, word for word, with the original Act executed in the year 1879 in the Register No. 81, in the presence of the late Warsaw notary, Lev Bushkovski, whose records are kept in the Deeds Registry Department of the Archives of the Warsaw Circuit Court, is issued to Bailia Mina Fels, daughter of Yankel, city of Warsaw, 29th May/10th June, 1915.

[Seal of Deeds Registry.]

" The Secretary of the Deeds Registry,

" (Signature) ."

" The President of the Circuit Court of Warsaw certifies the authenticity of the signature of the secretary of the Deeds-Registry, which is here applied.

" The fees of the Chancery have been paid, May 29, 1915.

" For the President.

" (Signature).

" Secretary,

" (Signature)."

" *Translation from French.*

" No. 112. The Chancery of the Governor-General of Warsaw certifies the authenticity of the legalization applied above by the Circuit Court of Warsaw.

" Warsaw, June 5/18, 1915.

" The Privy Councillor,

" (Signature, m.p.) Wieniawski."

It is contended on behalf of the respondent that one or both of these documents are admissible either under the common law or by virtue of the provisions of the New South Wales Act known as the Evidence Act, 1898. These two contentions are distinct and need separate examination. The argument in favour of the admissibility at common law depends upon the assumption that all official acts are rightly performed, and that the admitted circumstance that the two documents are literally identical is evidence that they were made from a common source which was faithfully transcribed.

Their Lordships are unable to accede to this contention. Until evidence is furnished that the documents are in fact copies they cannot be looked at, their identity cannot be established, and the inference that can be drawn from their identity does not arise. Nor is the record of an official by whom the document has been prepared any evidence that it is in fact a copy. At common law it would be necessary to prove that an alleged copy was a copy in fact, either by calling the man who made it or some person who had compared the copy and the original, and proved that one faithfully reproduced the other. No signature, however trustworthy, nor authentication by the most unimpeachable official, can take the place of the evidence required at common law to prove that a certain document is the copy of an original that is not produced. It was, however, urged that the earlier copy might be admitted since it was produced from the proper custody where it had remained for over thirty years. This contention also cannot prevail, for although in certain circumstances copies produced from proper custody may after the lapse of time be treated as good evidence, yet this cannot be the case where an original is in actual existence and a copy is capable of being obtained and properly proved.

So far, therefore, as the claim rests upon common law it could not be conceded. There remains, however, the consideration of the Evidence Act, 1898. This closely follows in language, though not in form, the Evidence Act, 1851 (14 & 15 Vict. c. 99), applicable to this country. But no decision has been called to their Lordships' attention, and they are familiar with none which renders any assistance in its interpretation upon this point. The relevant section in

J. C.
1918
PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES v. FELS.

the New South Wales Act of 1898 is s. 21, and it is in the following terms :—

"Evidence of—

"(*a*) Any judgment, decree, rule, order, or other judicial proceeding of any Court of justice out of New South Wales ; or

"(*b*) Any affidavit, pleading, or other legal document filed or deposited in any such Court ;

may be given by the production of a copy thereof—

"(*c*) Proved to be an examined copy thereof ; or

"(*d*) Sealed with the seal of such Court ; or

"(*e*) Signed by a judge of such Court, with a statement in writing attached by him to his signature on such copy that such Court has no seal, and without any proof of his judicial character or of the truth of such statement."

The earlier copy cannot come within the provisions as it satisfies none of the conditions, and it is clearly only by sub-s. (*b*), if at all that the later copy can be used. It is properly authenticated by the required seal of the Court. But does the original settlement come within the provisions of the section ? If so, it must come under the general phrase "other legal documents" ; but this the appellants assert cannot be the meaning of the phrase, since these words must, according to their contention, be interpreted in the light of the two earlier words "pleadings or affidavits," so that it must be a document of the same class as those named. There is no doubt that, in a phrase of this description, the doctrine known as that of ejusdem generis does apply, but it still remains necessary to ascertain what are the characteristics by which the genus is constituted. According to the appellants the documents must be documents that have come into existence in the course of a lawsuit and form part of legal proceedings. But this contention fails to give effect to the word "deposited." Dealing with the proceedings in our own Courts, to which together with all other Courts out of New South Wales the section applies, counsel for the appellants have been unable to mention any document of such a character which can be said to be deposited in Court. It would seem, therefore, that some wider interpretation must be given to the words than a meaning so limited.

Now the purpose of this part of the statute, as shown by its

contents, is to provide that documents that are in the lawful custody of a Court, and therefore are difficult or incapable of production, should be proved by a copy authenticated by the seal of the Court, and if these are taken as the characteristics by which the class of documents can be ascertained, there is no difficulty in defining the words "other legal documents," so as to cover such a document as that in the present case. It is a legal document, for it creates a solemn legal obligation of an important nature. It is deposited in Court, and the evidence is clear that the original cannot possibly be taken away. In these circumstances their Lordships think that the second copy produced on behalf of the respondent satisfies the necessary conditions and was properly admitted in evidence. They are fortified in this opinion by consideration of s. 22, which deals with documents that come into existence in the course of bankruptcy proceedings in New South Wales; the language there used is "instrument or copy of an instrument, affidavit, or document, made or used in the course of any bankruptcy proceeding," language which effects what the appellants contend is the true meaning of s. 21 but is in marked contrast to the former words. Their Lordships have not the advantage of a considered judgment upon this point by the learned judge by whom the evidence was admitted, but the general statement in his judgment referring to the admission of the copy appears to show that he thought the statute applicable. [Their Lordships' judgment then dealt with the construction of the settlement, which depended chiefly upon the meaning to be given to certain words in Russian. They agreed with the view of the trial judge and concluded as follows:] There was no suggestion of any wilful misconduct on the part of the executors, and they are therefore entitled to their costs "properly incurred." To prevent any misunderstanding, their Lordships will advise that the order of the learned judge be altered by substituting these words for the words used by him, and, subject to this slight modification, they think the judgment should be affirmed and this appeal should be dismissed with costs. They will humbly advise His Majesty to this effect.

Solicitors for appellants: *S. B. Cohen, Dunn & Co.*
Solicitors for respondent: *Valpy, Peckham & Chaplin.*

[PRIVY COUNCIL.]

J. C.* 1918 July 15.

HIP FOONG HONG . . . . . Appellants;

AND

H. NEOTIA AND COMPANY . . . . . Respondents.

ON APPEAL FROM HIS MAJESTY'S SUPREME COURT FOR CHINA.

Practice—New Trial—Fresh Evidence—Fraud or Surprise—Judgment not affected—Mode of Procedure.

To obtain a new trial upon the ground that fresh evidence has been discovered, if no charge of fraud or surprise is brought forward, it must be shown that the fresh evidence would be conclusive; but that consideration does not apply to a case of surprise, much less to one of fraud. If a judgment is affected by fraudulent conduct it must be set aside.

Judgment of the Supreme Court at Shanghai rejecting a motion for a new trial based upon allegations of perjury and bribery, affirmed on the ground that it did not appear that the decision at the trial had been affected by the fraud alleged.

When it is alleged that a judgment has been obtained by fraud an independent action to set aside the judgment is a more convenient mode of procedure than a motion for a new trial supported by affidavits.

Appeal from a judgment of the Supreme Court at Shanghai (January 12, 1917).

The judgment appealed from rejected a motion by the appellants for a new trial of an action between the parties. The motion was based upon evidence that witnesses called for the respondents at the trial had committed perjury, and that the respondents' case had been supported by bribery and other fraudulent conduct. The motion was heard upon affidavit evidence.

The facts appear from the judgment of their Lordships.

1918. June 13, 14, 17. *D. M. Hogg K.C.* and *A. M. Latter* for the appellants.

Hughes K.C. and *A. C. Nesbitt* for the respondents.

* *Present:* Earl Loreburn, Lord Buckmaster, and Lord Dunedin.

[Reference was made to *Young* v. *Kershaw* (1), *Warham* v. *Selfridge & Co.* (2), *Robinson* v. *Smith* (3), and *Brown* v. *Dean.* (4)]

July 15. The judgment of their Lordships was delivered by

LORD BUCKMASTER. This is an appeal from an order of the Full Court of His Britannic Majesty's Supreme Court for China sitting at Shanghai, refusing the appellants' application for the new trial of an action heard by the Chief Judge, Sir Havilland de Sausmarez, on July 7, 1916, and decided in favour of the respondents.

An appeal was originally instituted against the judgment itself, but this was abandoned in favour of the attempt to obtain a new trial. The appellants were well advised in the course they thus took. The difficulties that beset the hearing of the action were not of a nature that could be better resolved before their Lordships than they were before the learned judge who tried the case. No question of law whatever was involved in the issue ; the conclusion depended upon the determination of the claims of contending witnesses and the balance of commercial probabilities, weighed with the knowledge of local habits and local manners.

The soundness of the judgment on the material originally before the learned judge is therefore no longer in controversy ; but, none the less, it is essential for the determination of this appeal that there should be some examination of the facts leading up to the dispute.

The appellants are a Chinese firm residing in Shanghai and dealing in opium. The respondents are a firm of British Indian opium merchants, with head offices in Calcutta and Bombay and a branch office in Shanghai. Between August 10, 1911, and February 14, 1912, contracts were entered into between the appellants and the respondents by which the respondents agreed to sell to the appellants 175 cases of opium in parcels deliverable four months after the date of the respective contracts.

In January, 1912, the importation of opium into several of the provinces of China was prohibited, and the position alike for the Chinese dealers and for the Indian merchants became hazardous in the extreme. Had the strict rights under all the existing contracts been relied upon and enforced, the Chinese dealers would,

(1) (1899) 81 L. T. 531.
(2) (1914) 30 Times L. R. 344.
(3) [1915] 1 K. B. 711.
(4) [1910] A. C. 373.

J. C. 1918

HIP FOONG HONG v. H. NEOTIA AND COMPANY.

in all probability, have been unable to meet their obligations and the merchants would have found themselves unable to recover payment for their delivered goods. In order to relieve the position two combinations were formed—one known as the "Foreign Opium Merchants' Combine," and the other as the "Chinese Opium Guild"—with the object of regulating the flow and distribution of opium so as to enable the contracts to be slowly and effectually liquidated. For this purpose agreements were come to between the combine and the guild by which the combine should sell when opportunity offered, and that, so far as Bengal opium was concerned, one half of the sale should be apportioned among the members of the guild and one-half among the foreign merchants, such latter half being divided pro rata between bargain stock, i.e., stock subject to contract and not delivered, and the unsold stock. This method of liquidation proceeded, and towards the end of 1914 the markets became more easy and private deliveries capable of being carried into effect.

These circumstances need to be borne in mind in considering the conduct of the appellants and respondents in relation to the matter. So far as the appellants were concerned, they took some small deliveries of the opium in 1912, but they failed to take any substantial delivery throughout the whole of that year; and claims for interest were consequently made against them by the respondents. On February 17, 1913, the respondents made a return to the Opium Combine of their contracts, and included therein the whole of the balance of the appellants' contracts. In January, 1914, the appellants asked for delivery of twenty chests, the respondents only objecting upon the ground that the quality asked for was of the poor quality, and was not equally distributed among the various classes of opium.

Nothing further took place till May, 1915, when the appellants asked for delivery of the balance of opium and were met with the refusal to deliver on the part of the respondents, based on the ground that the contracts had been cancelled in November, 1912. The appellants thereupon sued the respondents for damages for non-delivery of the opium, and to that action the respondents repeated their allegation that the contracts were no longer on foot but had been duly cancelled.

This was the dispute that came before the learned judge for trial, and he decided it in the respondents' favour. There were many circumstances in the case on each side that were difficult to explain, but the learned judge accepted the statement of the respondents' representative, Ganesh Chandra Ghose, that the contracts had been cancelled by arrangements between the parties, fortified by an entry against the original contract as it stood, signed by the appellants in the respondents' book with the word "cancelled" written against it, and supported also by a statement that in the Chinese books the contracts were referred to with a note that they had been transferred to the respondents' firm.

There were two strong pieces of evidence against the respondents' contention—the first that in the statement made on February 17, 1913, by them to the combine the contracts had been referred to as existing contracts, and the other that when application was made for the deliveries in January, 1914, no allegation that the contracts were cancelled was set up.

The learned judge in no way minimized the gravity of these facts, and duly weighed them against the probabilities and the circumstances that he thought told against the plaintiffs' claim, and in the result dismissed the action.

An appeal against such a judgment would, indeed, have been difficult to support, and the application for a new trial was not based upon any complaint in connection with the original hearing, but upon the ground that further matter had been disclosed which showed that the defendants' case was so tainted with fraud and dishonesty that, in the interests of justice, the appellants were entitled to have the matter reheard. The material upon which this charge of fraud was framed in part consists of the affidavits of certain witnesses, one of whom had given evidence at the earlier trial, but chiefly of certain documents of which possession was secured by the issue of a search warrant against one Karanje, one of the respondents' witnesses, who was charged with perjury and absconded from the charge. It has been held that the search warrant was improperly issued, and, though this fact has no bearing upon the merits of this appeal, their Lordships are constrained to express their disapprobation of the unlawful issue of search warrants and the entrance into a man's house by that means for the purpose

J. C. 1918

HIP FOONG HONG v. H. NEOTIA AND COMPANY.

of obtaining access to his private documents. The documents that were seized in this manner were certain copies of bill books, the books relating to the sale of Bengal opium, and certain telegrams said to disclose a fraudulent and improper means of obtaining evidence on the respondents' behalf. The most important of these were the extracts from the bills copy books showing the accounts of the Bengal chests cleared, and the balance remaining of bargains liquidated during the combine. This is dated July 24, 1914, and it shows as an existing bargain the contract with the respondents for the 169 chests, the balance undelivered of the original contracts. Against this 169 there is put an apportioned amount of the opium sold through the combine, and the balance remaining is set out in another column.

It was alleged at the hearing that no other books existed beyond those disclosed bearing on this matter ; and it is plain that this book was material and should have been produced. It must, however, be remembered that it added nothing beyond a repetition of the statements made on February 17, 1913—a circumstance which, as has already been pointed out, the learned judge had fully and duly weighed in arriving at his conclusion, and the production of this book discloses no new fact.

A telegram, however, dated July 19, 1915, from Calcutta to Shanghai contains a request to send to Calcutta the contracts, and this involved sending the books in which the originals were contained. This fact contradicted the evidence of Karanje, who swore that the book had gone to India in 1914 ; while, finally, another witness named Shirazi was shown by other documents to have been promised and paid 56,000 taels as a reward for giving evidence in favour of the respondents, and that Sun Fuh Pao, or as he was also called Chug Fok Pow, the compradore, had been promised 5 per cent. interest from the result of the litigation by the defendants. The assistant compradore, Ching Chi Sen, who had given evidence at the trial, and one Saurastri, an employee of the defendants, also made affidavits –the first that he was directed to make the entry of transfer in the Chinese contract book in 1916, and was told to say that the contracts were cancelled in 1912 ; while Saurastri speaks to the contract book being sent back in July, 1915. Saurastri's evidence does not carry the matter very much further.

He had charge of the books, and he does not say that, when he sent the book, it did not contain the word "cancelled" against the contract, and he further states that the book was brought back in October, 1915, and he gives no explanation of the undoubted fact that it was in Calcutta again when Ghose gave his evidence in February, 1916. The affidavit of the other witness cannot be trusted. A man who says one thing on oath at a trial and contradicts it by his bare oath subsequently on an affidavit cannot expect that much credence will be given to the latter assertion which proves that his former evidence was false. The witness who received the 56,000 taels proved nothing whatever at the trial. His evidence as recorded in the judge's notes was totally valueless, and the judge attaches no importance whatever to what he said.

Their Lordships regard with great disfavour the method of obtaining evidence which these documents disclose; but they are unable to find that even if the purpose was dishonest—and there is not sufficient material before them to decide that issue one way or the other—the dishonesty produced any result that had the least effect upon the mind of the learned judge who heard the case. Of the two learned judges who formed the Full Court from which this appeal is brought the one was the learned judge who heard the case himself, and at the conclusion of his judgment he makes the following statement: "Given, for the moment, that the defendants' preparation of the case was improper, a charge in which it is unnecessary to say their legal advisers are not in the least involved, this does not substantially affect the judgment, which is not in itself impugned. The documentary evidence, which has been discovered and which was primarily relied on, does not carry the case far, and it is now bolstered up by unsatisfactory evidence, which will only become more unsatisfactory with the lapse of time and the increasing opportunity for contradiction. A second trial must in many ways be less satisfactory than the first." From that expression of opinion their Lordships are not prepared to dissent.

It is, however, urged on the appellants' behalf that the learned judge's conclusion was due to a misapprehension on his part of a decision in the House of Lords of *Brown* v. *Dean*. (1) In that case it was stated, in the opinion of Lord Loreburn, that when an

(1) [1910] A. C. 373, 374.

J. C. 1918

HIP FOONG HONG v. H. NEOTIA AND COMPANY.

application is made for a new trial on the ground of discovery of new evidence " it must at least be such as is presumably to be believed, and if believed would be conclusive." But that case had nothing to do either with fraud or with surprise, as was indeed pointed out. It dealt merely with the claim for a new trial based on the ground that further evidence could be obtained that was not obtainable when the trial took place. Fraud or surprise or both are the ground of the application in the present case, and the learned judges were in error in thinking that the authority in itself had any direct and present application to the matter they were considering. In all applications for a new trial the fundamental ground must be that there has been a miscarriage of justice. If no charge of fraud or surprise is brought forward, it is not sufficient to show that there was further evidence that could have been adduced to support the claim of the losing parties ; the applicant must go further and show that the evidence was of such a character that it would, so far as can be foreseen, have formed a determining factor in the result. Such considerations do not apply to questions of surprise, and still less to questions of fraud. A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail ; but in the present case their Lordships are unable to say that such a case has been established. They think the judgment of the Supreme Court was in its conclusion correct. They have only to add that, where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved ; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out, and determined, though a motion for a new trial is also an available weapon and in some cases may be more convenient.

In their opinion this appeal must fail and should be dismissed with costs, and to this effect they will humbly advise His Majesty.

Solicitors for appellants : *Stephenson, Harwood & Co.*
Solicitors for respondents : *Wadeson & Malleson.*

[PRIVY COUNCIL.]

ALOYSIA MUTTUNAYAGAM AND ANOTHER . APPELLANTS ; J. C.*

AND 1918

MARGARET BRITO . . . . . RESPONDENT. *July* 22.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Roman-Dutch Law—Husband and Wife—Communio Quaestuum—Antenuptial Contract—Death of Wife—Adverse Possession—Prescription Ordinance (III. of 1871), s. 3.

Upon a marriage in Ceylon in 1866, the parties, who were subject to Roman-Dutch law as there administered, entered into an antenuptial deed whereby it was provided that the wife "doth renounce all rights to community so far as the property estate and effects of C. B." (the husband) "are concerned it being understood that the said C. B. shall hold and enjoy his separate property without any claim thereto on the part of" the wife. The wife died in 1900. In 1879 the husband had bought an estate in Ceylon, of which he remained in possession until his death in 1910. By his will made in that year he devised the estate to a daughter. In 1914 two other children of the marriage sued the husband's executor and the devisee for shares in the estate, alleging that it had been subject to community between their parents:—

Held, that the deed upon its true construction did not exclude the wife's right to community in her husband's after-acquired property (communio quaestuum); and that the suits were not barred by s. 3 of the Prescription Ordinance, 1871, since the husband's possession had not been adverse to the plaintiffs.

Corea v. *Appuhamy* [1912] A. C. 230 applied.

CONSOLIDATED APPEALS from a judgment and decrees of the Supreme Court (December 10, 1915) reversing decrees of the District Judge of Negombo.

The consolidated appeals raised two questions for determination, namely, (1.) whether an antenuptial contract made in Ceylon in 1866, upon its true construction, excluded the wife's right to community in property acquired by the husband subsequently to the marriage, and (2.) whether after the death of the wife the possession by the husband of property so acquired by him was

* *Present:* LORD BUCKMASTER LORD DUNEDIN, and LORD WRENBURY.

J. C. 1918

MUTTU-NAYAGAM v. BRITO

adverse to the children of the marriage so as to make s. 3 of the Prescription Ordinance (III. of 1871) applicable.

The facts appear from the judgment of their Lordships.

The District Judge dismissed both suits, holding that the wife's right to community in her husband's acquired property (communio quaestuum) was excluded by the contract; he also held that the suits were barred by the Prescription Ordinance. The Supreme Court, upon an appeal reported at 19 Ceylon N. L. R. 38, reversed the decisions upon both points and made decrees in favour of the present respondents (defendants).

1918. June 20, 21. *P. O. Lawrence K.C.* and *Sproule* for the appellants. Upon the true construction of the antenuptial deed all rights of the wife to community in her husband's property were excluded. The deed is expressed in English terms, and should be construed apart from considerations of the technicalities of Roman-Dutch law. It is not necessary in Ceylon to exclude in terms both communio bonorum and communio quaestuum; it is sufficient if an intention to exclude both classes of community can be inferred from the deed: Burge, Colonial and Foreign Law (1910), vol. 3, p. 396. The statement in Van Leeuwen (Con. For. 1. 1, 12. 10.) means merely that an exclusion in terms of communio bonorum only does not effect an exclusion of communio quaestuum. If, however, the wife had a right of community in the after-acquired property (communio quaestuum), the suit was barred by s. 3 of the Prescription Ordinance, III. of 1871. After the death of the wife the husband was in adverse possession. The words in brackets in s. 3 are a definition of "adverse possession" for the purposes of the section, and include the circumstances in this case. The decision in *Corea* v. *Appuhamy* (1) does not apply for that reason, and because after the wife's death there was no joint or common ownership. According to Roman-Dutch law as adopted both in Ceylon and in South Africa, the community came to an end upon the death of the wife: *Wijeyekoon* v. *Goonewardene* (2), Pereira, Laws of Ceylon, 2nd ed., p. 242; Maasdorp, Institutes of Cape Law (1903), vol. 1, p. 90. The rights of the children or the wife's executor were merely rights in

(1) [1912] A. C. 230.
(2) (1892) 2 Ceylon L. R. 59; 1 Ceylon S. C. R. 147.

action. In any case, the husband was entitled to have the mortgages discharged out of the property, and an account should have been ordered.

De Gruyther K.C. and *Kenworthy Brown* for the respondents. Upon its true construction the deed did not exclude the wife's right to community in her husband's after-acquired property. The parties were subject to Roman-Dutch law, and the deed must be construed upon the basis that they understood the effect of that law. The authorities show that the exclusion of communio quaestuum must be clear and express, though that term need not be specifically used : Burge (1910), vol. 3, pp. 294, 396. The suit was not barred by the Prescription Act, because the husband's possession was not adverse. Whether or not the community continued for all purposes, the husband, until a division took place, was entitled to hold and administer the property on behalf of himself and the executor or children : Nathan, Common Law of South Africa (1904), vol. 1, pars. 507, 509 : Burge (1910), vol. 3, pp. 425, 426. In *Corea* v. *Appuhamy* (1) the Board expressly approved the rule that possession is not adverse if it can be attributed to a lawful title ; that decision applies. The decision in *Wijeyekoon* v. *Goonewardene* (2) does not affect the respondent's contention. It was not intended by the decree appealed from to exclude the husband's rights in respect of the mortgages ; those rights are confined to debts incurred during the marriage.

P. O. Lawrence K.C. in reply. The rights of the wife's executor were analogous to those which arise upon the death of a member of a partnership : *Knox* v. *Gye* (3) applies.

July 22. The judgment of their Lordships was delivered by

LORD DUNEDIN. The late Christopher Brito, advocate in Ceylon, married in June, 1866, Tangamma Nanny Tamby, a Tamil lady. The lady's father was possessed of a property called Plopalle, which he was willing to settle on the spouses. Accordingly an antenuptial contract of marriage was entered into between the affianced spouses, to which the father of the lady was a party, by

(1) [1912] A. C. 230.
(2) 2 Ceylon L. R. 59.
(3) (1872) L. R. 5 H. L. 656, 675.

J. C. 1918 MUTTU-NAYAGAM v. BRITO.

which Plopalle was settled on the spouses and survivor in life interest, and after their death on the children of the marriage, whom failing on the heirs of the lady.

The spouses had four children, two sons and two daughters, the eldest son, Philip Brito, married a wife, Lily. He died in 1911, leaving a will in favour of his wife and children and appointing his widow executrix. The elder daughter, Theresa, married Elangai Seni Wasager Senathi Raja. She died in 1905, leaving a will in favour of her husband. The younger daughter, Aloysia, married A. M. Muttunayagam, and is with her husband appellant in these suits.

After his marriage Christopher Brito acquired an estate called Dombawinne.

Tangamma Brito died on March 31, 1900. C. Brito died on December 26, 1910, and left a will in favour of his daughter Aloysia appointing her husband as his executor.

After the death of the wife, Tangamma, there were violent family quarrels and estrangement between Brito and his eldest son. No claim was made against Brito in his lifetime after the death of his wife by any of the children as in right of their mother. There had also been quarrels between the husband and wife, but they had been settled by the husband giving up his life interest in Plopalle.

The two suits which are consolidated in this appeal were raised, the one by Lily, the widow of the eldest son, as his executrix, and the other by Senathi Raja, as executor of his deceased wife, Theresa, and were both directed against Aloysia and her husband, who as beneficiary and executor of C. Brito were in possession of the estate of Dombawinne. The demand of each plaintiff is for a declaration of right to one-eighth share of Dombawinne. The claims are made as in right of their share of their mother Tangamma's share of the goods in communion. Tangamma's share being one-half, and there being four children, the share of each child was one-eighth.

The law of Ceylon in the case of marriages solemnized before June 29, 1877, since which date only the Matrimonial Ordinance of 1876 (1) has effect, is the original law founded on the Roman-

(1) The Matrimonial Rights and Inheritance Ordinance (XV. of 1876), by s. 8 provided that there should be no community of property as a consequence of marriage.

Dutch law. Under that law it is not doubtful that on marriage, if there is no antenuptial contract providing otherwise, there enures ipso jure a communion of property between the spouses. This communion of property is divided, so to speak, into two heads, communion of the property held by the spouses at the moment of the marriage, commonly called communio bonorum, and communion of property acquired during the subsistence of the marriage, commonly called communio quaestuum. It was, however, possible by an antenuptial contract to renounce the communio in either or both of its branches. Accordingly the first argument in defence in this case is based on the marriage contract as to Plopalle. This defence was given effect to by the learned District Judge but was rejected by the Court of Appeal.

The words in the contract are (after the settlement of the estate on the persons above mentioned): "And in consideration of the premises the said Tangamma doth hereby renounce all right to community so far as the property, estate, and effects of the said Christopher Brito are concerned, it being understood that the said Christopher Brito shall have, hold, and enjoy his separate property without any claim thereto on the part of the said Tangamma."

Their Lordships are of opinion that this is a question of construction, and of construction alone. Either the communio quaestuum was renounced or it was not. That was settled at the moment of signing the contract, and it seems to their Lordships illegitimate to do what the learned District Judge did, namely, to try to colour the construction by the after-behaviour of the parties.

On the question of construction their Lordships agree with the Court of Appeal. It appears to be absolutely settled by consistent authority that the communio quaestuum and the communio bonorum must be each indubitably dealt with—that is to say, that mere general words which may be satisfied by reference to the communio bonorum will not avail to discharge the communio quaestuum. Thus Van Leeuwen (Con. For. 1. 1. 12.10.) says: "If community of goods be excluded, community in gains accruing or losses resulting is only held to be excluded if that be expressly stated." To the same effect is Burge, vol. 3, p. 397, who there cites a passage from A.v. Wesel: "Igitur exclusa pactis dotalibus bonorum communione, lucri damnique in matrimonio facti com-

J. C. 1918 — MUTTU-NAYAGAM v. BRITO.

munio remanet." This being so, it seems impossible to say that in this contract the communio quaestuum was excluded. Mr. Lawrence argued that the generality of the English word "property" must not be taken as equivalent to bona as opposed to quaestus. But it was a contract drawn up in Ceylon by Ceylon lawyers who knew the law, and it was incumbent on them to make the matter clear. The onus is on the party who says that quaestus were excluded. That onus was not in this case discharged.

The second ground of defence is based on the Limitation Ordinance. It is said that after the death of his wife Christopher Brito, and after him the appellants, possessed the property on adverse title for ten years. This defence was also sustained by the learned District Judge, but was rejected by the Court of Appeal. It is the fact that no claim was made by the wife's next of kin after her death, and that the strained family relations made it likely that such a claim would have been preferred. From these circumstances the District Judge drew the conclusion that the possession was "adverse."

This, however, depends on what was the character of C. Brito's possession as a matter of right. The learned District Judge seemingly overlooked the case of *Corea* v. *Appuhamy* (1), which the learned judges of the Court of Appeal took as decisive of the question. In that case it was held by this Board that the possession of one co-parcener could not be held as adverse to the other co-parceners. Lord Macnaghten, who delivered the judgment, cited the dictum of Wood V.-C. in *Thomas* v. *Thomas* (2): "Possession is never considered adverse if it can be referred to a lawful title."

The question, therefore, comes to turn on whether that case truly applies, and that depends on the true character of the interest in the estate, to wit, the half-share in communion which on the death of the lady passed to the next of kin. If that interest is or is analogous to the interest of co-parcenary, the case applies; if it is a mere right of action against the surviving husband, it does not. In the latter case the defence is clearly good, whether under the limitation of ten years as applying to suits in connection with land, or under the limitation of three years, which applies to all rights of action not specifically dealt with. Accordingly Mr. Lawrence's

(1) [1912] A. C. 230. (2) (1855) 2 K. & J. 79, 83.

argument was entirely directed to this point. The point is perhaps rather assumed than argued in the judgments of the learned judges of the Court of Appeal, but they do not seem disturbed by any doubts as to it. It may well be that they thought it so clear that, no argument to the contrary being addressed to them (for the argument before them evidently turned on alleged ouster), they thought it unnecessary to discuss the point. Thus Ennis J. says: "On the death of Tangamma, Christopher became a co-owner of Dombawinne with his children." Shaw J. says: "Christopher Brito undoubtedly remained in possession of the property from the time of his wife's death, but he was a co-owner with his children."

The authorities are not so absolutely clear on the matter as might be wished, and for the following reason. They are chiefly concerned with the question of continuing community or "boedelhouderschap." In some of the provinces this existed, in others it did not. Where it did, then, until put an end to by the lodging of an inventory, &c., there was a real continuing communio between the surviving spouse and the children just as there had been between the spouses. There is, however, a judgment of the Supreme Court of Ceylon in which it was held that this custom had never been introduced into Ceylon: *Wijeyekoon* v. *Goonewardene*. (1) Accordingly many of the remarks made by the writers on Roman-Dutch law generally as to what remains to be done by the surviving spouse are made with reference to the prevention of the "boedelhouderschap." On the whole, however, the authorities seem to be in accordance with the view of the learned judges of the Court of Appeal. Thus Burge, vol. 3, p. 425, says: "Though at the death of either of the spouses the community came to an end, an estate was left to which the survivor together with the next of kin was entitled. If there were children of the marriage, and the marriage property had been held in joint-ownership by the spouses, it remained joint-property between the survivor and the children. If there had existed between the spouses community of property in the sense of 'holding in common,' the children or other next of kin of the predeceased spouse inherited half the common property and remained owners in common with the surviving spouse until division." It is only after having said this that he goes on to point out the distinction between

(1) 2 Ceylon L. R. 59.

J. C. 1918

MUTTU-NAYAGAM v. BRITO.

the provinces where there is a continuing community and where there is not.

Their Lordships are therefore of opinion that there is, to say the least of it, no material put before them which would enable them to say that the view taken as above by the learned judges of the Court of Appeal was wrong.

There is, however, one matter which must be mentioned. During his lifetime, and before the death of his wife, C. Brito mortgaged the estate of Dombawinne, first for the sum of Rs.60,000, and secondly for the sum of Rs.30,000. After the death of his wife, he in 1904 made a further tertiary mortgage for Rs.30,000. As regards the first two, there is no question of his right to do so, and it is clear that the right declared in favour of the respondents must bear its proportionate share of the burden. As regards the last, there being no continuing community he could not mortgage the whole property for his own debts, but he could do so to pay debts incurred during the communio. The decree must therefore be varied by adding a declaration to the effect that the one-eighth share in each case adjudged to the respective plaintiffs is liable to its proportionate burden of Rs.60,000 and Rs.30,000 respectively, and, as the parties are not agreed, there must be an inquiry as to whether the mortgage for Rs.30,000 in 1904 was created for the purpose of the payment of debts incurred during the subsistence of the communio.

Subject to these variations, their Lordships will humbly advise His Majesty to dismiss the appeals with costs.

Solicitor for appellants : *O. A. Cayley.*

Solicitors for respondents : *T. L. Wilson & Co.*

[PRIVY COUNCIL.]

EGBERT AND OTHERS . . . . . APPELLANTS; J. C.*

AND 1918

NATIONAL CROWN BANK . . . . . RESPONDENTS. *July* 26.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Principal and Surety—Bank Guarantee—Termination by Notice—Construction—Alteration of Contract with Debtor—Illegal Rate of Interest—Effect on Guarantee—Bank Act (R. S. Can., 1906, c. 29), s. 91.

By an agreement the six signatories thereto jointly and severally agreed with a Canadian bank to guarantee repayment up to a fixed sum of all liabilities (including interest) which a customer had or should incur to the bank: it was provided that the agreement should be a continuing guarantee "until the undersigned, or the executor or administrator of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guarantee." In 1913 the bank, without notice to the guarantors but with the assent of the debtor, increased the rate of interest upon the advances to 8 per cent., though by the Bank Act (R. S. Can., c. 29), s. 91, it was illegal for a bank to charge more than 7 per cent. Subsequently one of the signatories died and his executors gave notice purporting to terminate the liability of the estate of the deceased under the guarantee:—

Held: (1.) that the guarantee remained in force against all the guarantors until each and all of them, or their respective executors or administrators, gave notice to determine it; (2.) that the increase in the rate of interest did not discharge the guarantors, but that they were liable for the principal sum advanced and for such interest as the debtor was legally liable to pay.

APPEAL from a judgment of the Supreme Court (January 13, 1917) varying a judgment of Walsh J.

The respondents sued the appellants in the Supreme Court upon a contract dated April 8, 1912, whereby payment to the respondents of liabilities which Woodcrafts, Limited, were under or might incur to them were jointly and severally guaranteed. The material terms of the contract and the facts appear from the judgment of their Lordships.

Walsh J., the trial judge, gave judgment for 60,920 dollars.

* *Present:* LORD BUCKMASTER, LORD DUNEDIN, and LORD ATKINSON.

J. C.
1918
EGBERT
v.
NATIONAL
CROWN
BANK.

The Appellate Division (Scott, Stuart, Beck, and Ives JJ.) varied the judgment by directing that credit should be given to all the guarantors for the amount by which the interest collected by the respondents from Woodcrafts, Limited, exceeded 7 per cent. per annum in those cases in which interest was deducted from the amount of promissory notes before crediting the account, and 5 per cent. in those cases in which interest was added upon notes falling due; that credit should be given to the appellants the executors of Breckenridge for the amount of new advances (other than renewals) made subsequently to the notice of August 7, 1913 (that amount to be ascertained by a referee). The Appellate Division agreed with the trial judge that the change in the rate of interest did not discharge the liability of the guarantors; that the notice above referred to only operated to relieve the executors in respect of advances subsequently made, and did not relieve the other guarantors; and that it had not been shown that there had been any repayment by the application of the rule as to appropriation of payments in account.

1918. July 1. *E. P. Davis K.C.* and *Hon. M. Macnaghten* for the appellants. The contract described the transactions to be guaranteed as dealings by the respondent bank "in the way of its business as a bank." By the Bank Act (R. S. Can., 1906, c. 29) it is illegal for a bank to charge over 7 per cent. interest; it was therefore an implied condition that no higher rate should be charged: *McHugh* v. *Union Bank of Canada*. (1) The effect of the increase in the rate, of which the appellants had not notice, was to discharge all the guarantors: *Pidcock* v. *Bishop*. (2) Secondly, under the terms of the contract the notice of August 7, 1913, discharged all the guarantors as from that date. After that date the account was continued without any break, and the liability of the debtor at that date was discharged by subsequent credits, which must be appropriated to it under the rule in *Clayton's Case*. (3) Further, by the subsequent renewals time was given to the debtor and the guarantors were consequently discharged. In any case the notice terminated the liability of the executors of Breckenridge as from August 7,

(1) [1913] A. C. 299. (2) (1825) 3 B. & C. 605.
(3) (1816) 1 Mer. 572.

1913, and their liability in respect of the debt at that date was discharged having regard to the above considerations. [*Coulthart* v. *Clementson* (1), as to the effect of a guarantor's death, was also referred to.]

D. L. McCarthy K.C. for the respondents. The increase in the rate of interest did not effectively increase the liability and was not such a change in the contract with the debtor as to discharge the guarantors. The guarantors were all directors of Woodcrafts, Limited, and it should be inferred that they knew and approved of the arrangement. It was not ultra vires for the bank to refuse to discount notes save at 8 per cent. The facts do not bring the case within *Pidcock* v. *Bishop*. (2) Upon the true construction of the contract the liability of the several guarantors could only be terminated by a notice from them all: *Beckett & Co.* v. *Addyman*. (3) If, however, the guarantee was not in force after August 7, 1913, as to any of the guarantors there was no discharge of the then existing liability. The contract expressly permitted the bank to "grant extensions," i.e. to give time to the debtor. The rule in *Clayton's Case* (4) only raises a presumption; upon the facts it should be inferred that there was no appropriation of the credits after August 7, 1913, to the then existing debt.

E. P. Davis K.C. replied.

July 26. The judgment of their Lordships was delivered by

LORD DUNEDIN. The respondents are a bank having a branch at Calgary in the province of Alberta. The appellants are the surviving signatories and the executors of one deceased signatory, whose name was Breckenridge, to a letter of guarantee executed in favour of the bank. The guarantee was given to secure the advances made and to be made to a company called Woodcrafts, Limited, of which the guarantors were directors.

The arrangement had its inception in May, 1911, when a letter of guarantee was granted to the amount of 20,000 dollars. This was superseded in December, 1911, by another for 50,000 dollars, and that again superseded on April 8, 1912, by the guarantee now in question for 75,000 dollars.

(1) (1879) 5 Q. B. D. 42.
(2) 3 B. & C. 605.
(3) (1882) 51 L. J. (Q.B.) 597.
(4) 1 Mer. 572.

J. C
1918
EGBERT
v.
NATIONAL CROWN BANK.

The present action is raised in respect of the guarantee, and there is no question but that there is due from the company to the bank sums which in all do not exceed 75,000 dollars. The defence is rested upon two separate points with which their Lordships will presently deal. They were both repelled by the learned trial judge, whose judgment was with a variation affirmed by the Court of Appeal.

It will be convenient first of all to set forth the material portions of the guarantee. They are as follows :—

" In consideration of the Northern Crown Bank agreeing or continuing to deal with Woodcrafts, Limited, Calgary, Alberta, herein referred to as the ' customer,' in the way of its business as a bank, the undersigned hereby jointly and severally guarantee payment to the bank of the liabilities which the customer has incurred, or is under or may incur or be under to the bank, whether arising from dealings between the bank and the customer or from other dealings by which the bank may become in any manner whatsoever a creditor of the customer ; including in such liabilities all interest, computed with quarterly or other rests, according to the bank's usual custom, charges for commission and other expenses, and all costs, charges, and expenses which the bank may incur in enforcing or obtaining payment of any such liabilities (the joint and several liability of the undersigned hereunder being limited to the sum of 75,000 dollars, with interest at the rate of 7 per cent. per annum from the date of demand for payment of the same, which it is agreed the same shall bear).

" And the undersigned agree that the bank may refuse credit, grant extensions, take and give up securities, accept compositions, grant releases and discharges, and otherwise deal with the customer and with other parties and securities as the bank may see fit, and may apply all moneys received from the customer or others, or from any securities upon such part of the customer's indebtedness as it may think best, without prejudice to or in any way limiting or lessening the liability of the undersigned under this guarantee.

" And this shall be a continuing guarantee, and shall cover all the liabilities which the customer may incur or come under until the undersigned, or the executors or administrators of the undersigned,

shall have given the bank notice in writing to make no further advances on the security of this guarantee."

The ground of defence with which it is convenient to deal first is that the guarantee was brought to an end by notice. The facts as to this are that on one of the guarantors (Breckenridge) dying his executors on August 7, 1913, wrote a letter revoking the guarantee. Notwithstanding this, the account with the company was kept alive, renewals being taken for acceptances then current and fresh advances being made up to the time when the account was finally closed in the spring of 1915.

At their Lordships' Bar the effect of this was pleaded alternatively. It was argued, first, that this notice brought the guarantee to an end as regards all the guarantors, and, second, that it brought it to an end, at least as regards Breckenridge; and in either case it was further urged that the subsequent renewals were equivalent to giving time, and that consequently either all parties, or alternatively Breckenridge's executors, were free of all liability.

It is not necessary to examine what is the law in the case of death when nothing is said in the guarantee about its continuation or not. Here there is a clause which specially deals with the question of control, and the question necessarily depends on the true construction of that clause above quoted beginning "And this shall be a continuing guarantee."

Their Lordships are of opinion that this clause stipulates that the guarantee is to remain in force until there is a notice given by each and all of the guarantors, the executors of any deceased co-signatory coming in his place. Such a stipulation is in accordance with the literal meaning of the words, and is in harmony with what might be expected, looking to the position of the persons who were granting the obligation. Further, if it had been sought to allow any one to bring the guarantee to an end, either for himself or for all, nothing would have been easier than to express such an intention by such words as "all or any of the undersigned," or other appropriate expression. This disposes of the first ground of defence in both its alternatives.

The second ground of defence is this. By the Bank Act (R. S. Can., 1906, c. 29), s. 91, it is made illegal for a bank to charge interest at a rate greater than 7 per cent. The effect of that enactment was

J. C.
1918
EGBERT
v.
NATIONAL
CROWN
BANK.

discussed and settled in the case of *McHugh* v. *Union Bank of Canada*. (1)

In the present case, on January 22, 1913, the local manager of the bank, acting in accordance with instructions received from the head office, raised the rate of interest charged to the company from 7 per cent. to 8 per cent., and this change was agreed to by the company. The system of dealing was this. As acceptances fell due and were not met, new acceptances were got from the company, the bank then discounting these acceptances and crediting the account with the proceeds, while debiting it with the amount of the old acceptances. After the date of the change interest on overdrafts and discount rates were all calculated at 8 per cent. instead of 7 per cent. No intimation of this new arrangement was sent to the guarantors. They plead that in respect of this they are free.

The law as to this class of plea is well settled. *Holme* v. *Brunskill* (2) may be taken, as is remarked by the learned trial judge, as one of the leading authorities on the subject. The judgment of Cotton L.J., in which Thesiger L.J. concurred, contains the following passages: " The cases as to discharge of a surety by an agreement made by the creditor to give time to the principal debtor are only an exemplification of the rule stated by Lord Loughborough in *Rees* v. *Berrington* (3): ' It is the clearest and most evident equity not to carry on any transaction without the knowledge of him [the surety], who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him.' The true view, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is, without enquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that, if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an enquiry as to the effect of the alteration, or allow the question whether the

(1) [1913] A. C. 299. (2) (1878) 3 Q. B. D. 495, 505.
(3) (1795) 2 Ves. Jun. 540.

surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable, notwithstanding the alteration, and that if he has not so consented he will be discharged. This is in accordance with what is stated to be the law by Amphlett L.J. in the *Croydon Gas Co.* v. *Dickinson.*" (1)

This statement of the law was followed by Chitty J. in *Bolton* v. *Salmon* (2), and was inferentially approved by Lord Watson in *Taylor* v. *Bank of New South Wales.* (3) The matter is tersely summed up by Quain J. in the case of *Polak* v. *Everett* (4): "I think the convenience and policy of the matter . . . . is that the contract of the surety should not be altered without his consent."

The appellants argue that these authorities apply. They lay stress on the opening words: "In consideration of [the bank] agreeing and continuing to deal with [the company] as customer in the way of its business as a bank." They say that in respect of that they were entitled to suppose that dealings with the bank would be in accordance with the law, i.e., on a 7 per cent. basis; that an agreement between the bank and the company that dealings should be on an 8 per cent. basis was an alteration of the contracts, and that, this alteration not having been communicated to them, they were set free.

The question is not free from difficulty, but their Lordships think that the views of the Court of Appeal are right. What is guaranteed is not any one advance of 75,000 dollars, but all contractual indebtedness up to 75,000 dollars. That indebtedness may be, and in fact was, the result of a series of contracts. Each of the contracts was a contract to repay the money advanced with interest thereon. It is legitimate to read into each contract, from the guarantors' point of view, a condition that the interest should not exceed 7 per cent. But the difficulty in the appellants' argument lies in this, that the so-called agreement to charge 8 per cent. is statutorily invalid and of no effect. Though of no effect to legalize the interest, it does not invalidate the contract to repay the principal. That was inferen-

(1) (1876) 2 C. P. D. 51.
(2) [1891] 2 Ch. 48, 54.
(3) (1886) 11 App. Cas. 596, 603.
(4) (1876) 1 Q. B. D. 669, 677.

J. C.
1918
EGBERT
v.
NATIONAL
CROWN
BANK.

tially decided by *McHugh's Case.* (1) Accordingly the indebtedness in respect of the principal has not been interfered with. In so far as advances on current account are concerned, the only result of the attempted agreement is to make the interest run at 5 per cent., which cannot constitute a violation of an implied contract that interest should not be greater than 7 per cent. So far as the discounts are concerned, the excess is a mere voluntary payment which the debtor cannot recover, but which, in so far as they exceed 7 per cent., do not bind the guarantors in a statement as against them of the debtor's account. This is fully given effect to by the variation made by the Court of Appeal on the judgment as originally pronounced by the trial judge. In their Lordships' opinion, therefore, the facts are not such as to make the case fall within the legal principles above laid down.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants: *Gard, Lyell, Betenson & Davidson.*
Solicitors for respondents: *Blake & Redden.*

(1) [1913] A. C. 299.

[PRIVY COUNCIL.]

CITY OF REGINA AND OTHERS . . . . . APPELLANTS; J. C.* 1918

AND

J. McCARTHY . . . . . RESPONDENT. *July* 31.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Canada (Saskatchewan) — School Rate — Separate School District — Assessment of Minority—School Act (Sask., 1915, *ch.* 23), *s.* 39.

Under the statutes governing assessment for school rates in Saskatchewan, when a Protestant or Catholic separate school district has been set up, a Protestant or Catholic, as the case may be, in the district must be entered in the assessment roll as a separate school supporter, and is not entitled to be entered as a public school supporter.

APPEAL from a judgment of the Supreme Court of Saskatchewan (January 6, 1917) affirming a decision of the Local Government Board of that province.

The appeal related to assessment for school rates in Saskatchewan. The facts appear from the judgment of their Lordships.

1918. July 15, 16. *P. O. Lawrence K.C.* and *D. L. McCarthy K.C.* for the appellants.

Hon. F. Russell K.C. and *S. R. Curtin* for the respondent.

[Reference was made to the following statutes of Saskatchewan, more particularly to the sections mentioned:—The School Act (ch. 23 of 1915), ss. 39, 40, 41, 44 (as amended by ch. 43 of 1915, s. 43); the School Assessment Act (ch. 25 of 1915), ss. 35, 41, 45, sub-s. 2 (as amended by ch. 25 of 1916, s. 11); the Interpretation Act (R. S. Can., 1906, ch. 1), s. 21. There were also mentioned the British North America Act, 1867 (30 & 31 Vict. c. 3, Imp.), s. 93; the British North America Act, 1871 (34 & 35 Vict. c. 28, Imp.); the Saskatchewan Act (4 & 5 Edw. 7, c. 42, Can.), s. 17; and *City of Winnipeg* v. *Barrett.* (1)]

* *Present:* LORD FINLAY L.C., LORD BUCKMASTER, LORD DUNEDIN and LORD ATKINSON.

(1) [1892] A. C. 445, 453.

J. C.
1918
CITY OF REGINA v. McCARTHY.

July 31. The judgment of their Lordships was delivered by

LORD DUNEDIN. In the city of Regina there is a public school district and there is also a separate school district, the territorial boundaries of the districts being coterminous. The separate school district is a Roman Catholic separate school district. One Bartz, who is a Catholic and who in 1915 was entered in the assessment roll as a separate school supporter, applied in 1916 to be entered as a public school supporter. The request was granted by the official making up the roll and he was so entered. An appeal against this entry was taken by McCarthy, another separate school supporter (title to that effect being given by a clause in the statutes), to the Court of Revision, who confirmed the entry. Appeal was taken from this decision to the Local Government Board, who allowed the appeal and directed his name to be entered as a separate school supporter. This judgment was affirmed by the Supreme Court unanimously, to whom appeal had been taken. From the Supreme Court this appeal has been taken to this Board.

The case accordingly raises the straightforward issue, Can a person of the faith of the minority, who have established a separate school district, demand that he should be entered as a public school supporter? The question depends entirely on the statutory provisions which are contained in the three Acts, the School Act (ch. 23 of 1915), the School Assessment Act (ch. 25 of 1915), and the City Act (ch. 16 of 1915).

The Local Government Board delivered a most careful and reasoned opinion, and the result at which they arrived was confirmed by equally careful and elaborate opinions delivered by the learned judges of the Supreme Court. These various opinions express with so much precision and accuracy the views which are entertained by their Lordships that they can really add nothing to what has been already said. It is only in respect of the general importance of the question that they desire to state succinctly and in general terms what they think the gist of the matter.

The scheme of the Acts seems to their Lordships to be this. There is a power given to the community after certain preliminary steps to erect a public school district. Whether there is to be such a district or not is decided by vote, and by the result of that vote the majority binds the minority. If the district is erected and

nothing more is done, then all persons holding property in the district are assessable for school rates. The religious complexion of the school as between Protestant and Catholic is controlled by the majority who have voted for the creation of the district. But there is a conscience clause to protect parents having their children instructed in religious education which is not to their liking. There is, however, a power given to the minority, which means the members of the religious faith, be it Protestant or Catholic, who form the minority (for no other faiths have in this matter official recognition) to establish a separate school district with a separate school of their own religious complexion. In such a case the ratepayers establishing such a district are only liable for their self-imposed rate and not for public school rates. The legislation as to the formation and form of the assessment roll provides for a return by each assessable person, and prescribes a descriptive entry of P.S.S. (public school supporter) or S.S.S. (separate school supporter), as the case may be.

It seems to their Lordships that in this arrangement there are two guiding principles. The first is that after a vote the majority binds the minority. The majority settle as against the minority whether there shall be a district at all (there is a provision for the erection of a district on the motion of the Minister of Education, but this may be disregarded as extraneous to the present question). The second is that it is the criterion of religious faith which forms what may be called the subordinate constituency, and here again the majority compels the minority, either establishing or refusing to establish a separate school. If the school is established all must be rated.

It is true that the subordinate constituency form the minority of the whole constituency. As such they would have been assessed as public school supporters, were it not for the special exemption which is to be found in s. 39 of the School Act. But it is the very enfranchisement from the liability to pay public school rates that they get as a community which subjects them to the rule, so to speak, of the majority of their own community. It is impossible, their Lordships think, to read the words in s. 39, "ratepayers establishing a separate school," as applicable only to the majority of the minority.

J. C.
1918
CITY OF REGINA v. McCARTHY.

It is evident that there is a great practical advantage in working the scheme if the respondent's argument is sound. For the minority constituency to come to a common sense determination as to whether they shall or shall not establish a separate school it is necessary that they shall calculate what assessments are available. If the religious test is taken, that is simple enough, but if the minority constituency is liable to be depleted by some of its members leaving its ranks and enrolling themselves as public school supporters, it is evident that all calculations would be upset.

There are other arguments to the same effect, but, as has been already said, they are most adequately dealt with in the judgments below.

It should be added that the point as to whether the legislation in question was ultra vires was not pressed before the Board.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants: *Charles Russell & Co.*
Solicitors for respondent: *Bischoff & Co.*

[PRIVY COUNCIL.]

GIBB AND ANOTHER . . . . . APPELLANTS ;

AND

THE KING . . . . . RESPONDENT.

J. C.*
1918
July 4.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Expropriation of Land—Abandonment—Compensation—Petition of Right—Exchequer Court Act (R. S. Can., 1906, c. 140), s. 20—Expropriation Act (R. S. Can., 1906, c. 143), s. 23, sub-s. 4.

The Expropriation Act (R. S. Can., 1906, c. 143), s. 23, gives power to the Minister of Railways and Canals, by a registered notice, to abandon land which has been taken for a public purpose but which, before the compensation has been actually paid, has been found not to be required, and the land thereupon is to revest By sub-s. 4, "the fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken."

On January 24, 1911, land belonging to the appellants in Quebec was expropriated for a public purpose, and became vested in the Crown ; the amount of compensation was subsequently agreed but not paid. On December 30, 1912, the Minister registered a notice abandoning the land. By a petition of right the appellants claimed as compensation the difference between the sum originally agreed and the value of the land when it revested ; they recovered only their loss of rentals :—

Held—(1.) that the appellants were entitled to the sum originally agreed, subject to the revesting being taken into account with the other circumstances ; (2.) that the petition of right was maintainable under s. 20 of the Exchequer Court Act ; and (3.) that there should be a new trial.

APPEAL and CROSS-APPEAL, by special leave, from a judgment of the Supreme Court (December 23, 1915), dismissing, upon an equal division of opinion, an appeal from the Exchequer Court.

The appeals arose out of a petition of right brought by the appellants to recover compensation for land expropriated and subsequently abandoned to them.

* *Present :* EARL LOREBURN, LORD BUCKMASTER, and LORD SUMNER.

J. C. 1918 GIBB v. THE KING.

The circumstances of the case and the effect of the judgments in Canada appear from the judgment of their Lordships.

The appeal to the Supreme Court is reported at 52 Can. S. C. R. 402.

1918. June 4, 6. *P. O. Lawrence K.C.*, *Macmaster K.C.*, and *Douglas Hogg K.C.* for the appellants. The appellants had a vested right in the compensation originally offered and accepted; there is no statutory provision depriving them of that right. They cannot be regarded as having taken the compulsory revesting of the land as a satisfaction of their vested claim. The effect of s. 23, sub-s. 4, of the Expropriation Act is that the value of the land upon its revesting is to be taken into account as a set-off. The proceedings were properly brought by petition of right under s. 20 (*a*) and (*d*) of the Exchequer Court Act. Under s. 47 of that Act the compensation is to be assessed upon the value of the land when it was taken.

Hon. F. Russell K.C. and *T. Mathew* for the Crown. There is no provision for compensation under the Transcontinental Railway Act; the appellants' rights must therefore arise either by general law or under the Expropriation Act. They have recovered possession of the land and under general law cannot obtain against the Crown that which is really damages: *Feather* v. *Reg.* (1) Sect. 23, sub-s. 4, applies only to compensation for "land taken." When the compensation came to be assessed in this case the appellants' land had not been taken. The sub-section can be applied only when part of the land originally taken is abandoned. Proceedings under s. 20 of the Exchequer Court Act can be brought only in circumstances in which in England a petition of right could be maintained. For the reasons already put forward, therefore, there was no jurisdiction.

P. O. Lawrence K.C. replied.

July 4. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The main question upon this appeal is as to the existence and extent of the right of the appellants to obtain from the Crown either compensation or damages for land originally

(1) (1865) 6 B. & S. 257, 294.

appropriated by the Crown for purposes of public improvement, and subsequently abandoned and revested in the appellants. To this, the main subject of the controversy, is added the subsidiary question raised by cross-appeal of the Crown as to the jurisdiction of the Exchequer Court to determine the dispute. The case arises under the following circumstances :—The Government of Canada undertook the construction of the Eastern Division of the National Transcontinental Railway from the city of Moncton, in the province of New Brunswick, to the city of Winnipeg, in the province of Manitoba, and, in connection with the work contemplated, made arrangements for the removal of the market in the city of Quebec known as the Champlain Market. The construction of the railway was regulated by a statute known as the National Transcontinental Railway Act, 3 Edw. 7, c. 71, which provided that it should be under the charge of certain Commissioners who were created as a body corporate and referred to in the Act as " the Commissioners."

Sect. 13 of that statute enabled " the Commissioners " to take possession of land for the purpose of this branch of the railway, and the relevant part of the section is in the following terms: " The Commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate ; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein."

The predecessors in title of the appellants owned certain land and buildings in the city of Quebec which were situated upon the Champlain Market. Neither their title nor the devolution of interests by which the land is now vested in the present appellants need to be considered on this appeal. The phrase " the appellants " is used throughout by their Lordships to denote the true owners at the relevant and material dates. The Commissioners desired to acquire the appellants' property, and on January 24, 1911, a plan and description of the lot were duly deposited in the Registry Office in accordance with the provisions of s. 13 of the statute

J. C.
1918
GIBB
v.
THE KING.

already referred to, the result of such deposit being, according to the express terms of the statute, to vest the lands in the Crown, saving the lawful claim of the owners to compensation.

On October 2, 1911, the Attorney-General of Canada filed an information in the Exchequer Court of Canada offering the sum of 61,747.75 dollars as compensation for the expropriated property, and on October 25, 1911, the appellants filed their plea accepting the amount.

Before any further proceedings were taken to obtain payment by the appellants of the agreed amount the Attorney-General on March 19, 1912, filed a discontinuance of this information; on July 27 of the same year the Minister of Railways and Canals served on the appellants a notice, dated July 15, abandoning the lot, and on December 30, 1912, registered this notice in the office of the Registrar of Deeds.

The effect of that registration was, by virtue of a statute to which reference will be made, to revest the property in the appellants, who once more became the owners of their estate. They had in fact, never been divested of possession, and throughout the whole period had managed and dealt with their property to the best advantage, having regard to the altered circumstances which the actual or contemplated destruction of the market involved,

The changed conditions of the surrounding property had, however, as it is alleged, materially affected the capital value of the expropriated land—a result independent of the actual act of expropriation, but consequent upon the other operations which had been undertaken. The appellants accordingly claimed that in the circumstances they were entitled to be paid the compensation originally agreed less the amount to be taken into account by reason of the value of the land when revested in them, so that as the market value of the land when revested had fallen to an extent which the appellants alleged amounted to 31,747.75 dollars, they sought to recover this sum, together with a sum of 500 dollars for expenses, subsequently abandoned, and for this purpose filed a petition of right in the Exchequer Court of Canada. This petition was defended by the Crown on the ground that there was no jurisdiction in the Exchequer Court to hear the case, and that no claim for compensation had arisen.

The case was originally heard in the Exchequer Court by Audette J. He decided that there was full jurisdiction to hear the case, but dealt with it as a claim for damages " for the injurious affection of the suppliants' property as resulting from the expropriation by the Crown of the Champlain Market, or acquiring the same, and the taking down of the Butchers' Hall and failing to build there a terminal station " ; and so regarded he allowed the sum of 3000 dollars for the interference that had taken place with the appellants' tenancies.

From this judgment an appeal was brought to the Supreme Court and heard by six judges. The Chief Justice rejected the view that the action was an action for damages resulting from the abandonment, and thought that the case should be sent back to the Exchequer Court to determine the amount to be paid to the appellants " in payment of compensation due to the land being taken, taking into account in assessing the compensation the abandonment and all other circumstances of the case." Davies J. accepted the view of Audette J., as also did Idington J. Duff J., however, thought that there was no power to give the notice of July 15, 1912, since the statute under which it was given did not apply ; but held that, if it were applicable, the claim of the appellants was well founded. Anglin J. took the same view as the Chief Justice, and Brodeur J. agreed with Audette J. : with this difference of opinion, the appeal was dismissed ; and from that dismissal this appeal has been brought.

The appellants' claim depends upon the meaning and true construction of s. 23 of the Expropriation Act (R. S. Can., 1906, c. 143), which is in the following terms : " Whenever, from time to time, or at any time before the compensation money has been actually paid, any parcel of land taken for a public work, or any portion of any such parcel, is found to be unnecessary for the purposes of such public work, or if it is found that a more limited estate or interest therein only is required, the Minister may, by writing under his hand, declare that the land or such portion thereof is not required, and is abandoned by the Crown, or that it is intended to retain only such limited estate or interest as is mentioned in such writing. (2.) Upon such writing being registered in the office of the registrar of deeds for the county or registration division in

J. C.
1918
GIBB
v.
THE KING.

which the land is situate, such land declared to be abandoned shall revest in the person from whom it was taken or in those entitled to claim under him. (3.) In the event of a limited estate or interest therein being retained by the Crown, the land shall so revest, subject to the estate or interest so retained. (4.) The fact of such abandonment or revesting shall be taken into account, n connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken."

It is not necessary to consider the question whether this statute has any application to the present case. The proceedings have been conducted on the footing that the statute applied, and it is on the true construction of s. 23, and not on the application of the statute, that the case has been argued before their Lordships.

The appellants contend that their claim for compensation, which admittedly arose when the land was originally appropriated by the Crown, is not taken away by the provisions which enable the land to be restored, since the operation of s. 23 is merely to provide that in determining the amount of such claim the effect of the revesting is to be brought into account.

On behalf of the Crown it is disputed that s. 23, sub-s. 4, has any application to a case like the present, where the whole land taken has been restored, and it is asserted that if any claim can be maintained it is only in respect of the ownership of the property by the Crown for the limited period between January 24, 1911, and December 30, 1912, and even this cannot, it is said, be made the subject of the present proceedings.

The latter contention may conveniently be dealt with first, and is disposed of by the Exchequer Court Act (R. S. Can., 1906, c. 140). It is there provided by s. 20 that the Exchequer Court shal have exclusive jurisdiction to hear and determine, among other matters every claim against the Crown for property taken for any public purpose. This property was taken for a public purpose, and whatever the extent and true measure of the claim may be, it is a claim arising out of such taking of the property, and it is therefore, in their Lordships' opinion, clearly within the provisions of the statute. All the learned judges before whom this case has been argued are in agreement that there was jurisdiction, either under

this statute or independently of its provisions, and their reasoning leaves no room for further controversy.

The only question, therefore, is as to the construction of s. 23 of the Expropriation Act, and in particular of sub-s. 4 of that section. In order to give full effect to the true value of the words in this sub-section it is necessary to examine the essential purpose of the clause. This is to be found in the earlier sub-sections, which provide that either the whole or any part of a particular parcel of land found to be unnecessary may be abandoned by the Crown and that "such land declared to be abandoned" shall revest in the origina' owners. It is important to observe that in these provisions no distinction whatever is drawn between the abandonment of the whole or part of any parcel of land; whichever course is taken, such land revests. This consideration affords an important guide for the determination of the final sub-section. It is the fact of "such abandonment or revesting" which is to be taken into account in estimating the compensation, and, if the contention for the respondents were correct, it would be necessary to hold that "such abandonment"—which, in its natural meaning, can only refer to the abandonment previously mentioned including both the whole or part—is intended to have exclusive reference to the case where the part only is revested and not to the case where the whole is given up.

That construction is contrary to the plain meaning of the words, but it is of course possible that subsequent passages in the same sub-section might lead to the conclusion that the general phrase was intended only to have a partial and limited application. An indication of that intention is, according to the respondents, to be found in the last words of the sub-section, which provide that the fact of abandonment is taken into account in assessing the amount to be paid to any person "claiming compensation for the land taken." This, according to their argument, involves the conclusion that the person who claims compensation must be a person whose land has been taken and retained, as otherwise there would be no claim for land taken and no compensation to be assessed. Their Lordships are unable to accept this interpretation of the statute.

The claim for compensation arises on the original expropriation of the 'and. Nor is this claim defeated by the subsequent

J. C. 1918 GIBB v. THE KING.

proceeding. Even after revesting, the claim for compensation still remains open for adjustment, for it has nowhere been taken away or satisfied, and in its settlement the effect of the revesting is an element to be considered.

Their Lordships are therefore unable to accept the view that the true measure of the appellants' right is something in the nature of a claim for damages for disturbing or injuriously affecting. In fact, so far as the particular piece of land is concerned, the Crown does not appear to have done any act upon the land itself that would either damage or injuriously affect its value. Its advisers have been enabled by virtue of the section to change their mind and give back the property which they originally took, and it is this fact which must be considered with other circumstances in determining the original amount of compensation which they became liable to pay. Their Lordships think, therefore, that the judgment of Fitzpatrick C.J. was accurate in all respects, and that this case should be remitted to the Exchequer Court to determine and assess the compensation payable upon the footing that the fact that the land has been revested shall be taken into account in connection with all the other circumstances in determining the amount to be paid.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, that the cross-appeal should be dismissed, and that the respondent should pay the costs, both here and in the Courts below.

Solicitors for appellants : *Stephenson, Harwood & Co.*
Solicitors for respondent : *Charles Russell & Co.*

END OF VOL.